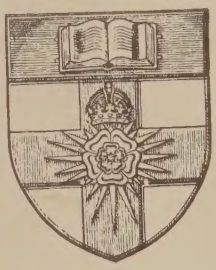
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REF

346·4 Mx North Gallery.



UNIVERSITY OF LONDON
LIBRARY

Edward L. Sumner
Lincoln
1872

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir Roundell Palmer, Knt., M.P., Q.C.

EX-OFFICIO MEMBERS.

The Attorney-General, Sir R. P. Collier, Knt., M.P.
The Solicitor-General, Sir J. D. Coleridge, Knt., M.P.
The Queen's Advocate-General, Sir Travers Twiss, Knt.

ELECTED MEMBERS.

Mr. Serjeant O'Brien Mr. Serjeant Pulling	Serjeants' Inn.
Sir Roundell Palmer, Knt., M.P., Q.C. R. P. Amphlett, Esq., M.P., Q.C.	Lincoln's Inn.
William Forsyth, Esq., Q.C. H. Warwick Cole, Esq., Q.C.	Inner Temple.
T. W. Greene, Esq., Q.C. John Gray, Esq., Q.C.	Middle Temple.
John A. Russell, Esq., Q.C. William Cracroft Fooks, Esq., Q.C.	Gray's Inn.
William Williams, Esq. (Firm—Messrs. Currie and Williams), Lincoln's Inn Fields W. S. Cookson, Esq. (Firm—Messrs. Cookson, Wainewright, & Pennington), 6, New Square, Lincoln's Inn	Incorporated Law Society.

Secretary—James Thomas Hopwood, Esq., 3, New Square, Lincoln's Inn.

THE

LAW REPORTS.

Court of Queen's Bench.

REPORTED BY

WILLIAM MILLS AND HENRY HOLROYD,
BARRISTERS-AT-LAW.

AND

In the Bail Court,

BY

ARTHUR WILSON,
BARRISTER-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. VI.

FROM MICHAELMAS TERM, 1870, TO TRINITY TERM, 1871,
BOTH INCLUSIVE.

XXXIV VICTORIA.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1871.

BIBL. LONDIN UNIV.

JUDGES

OF

THE COURT OF QUEEN'S BENCH.

XXXIV VICTORIA.

The Right Hon. Sir Alexander James Edmund Cockburn, Bart., C.J.

Sir Colin Blackburn, Knt.

Sir John Mellor, Knt.

Sir Robert Lush, Knt.

Sir James Hannen, Knt.

ATTORNEY GENERAL.

Sir Robert Porrett Collier, Knt.

SOLICITOR GENERAL.

Sir John Duke Coleridge, Knt.

ERRATA.

Page	*Line*	*For*	*Read*
141	18 from top ..	"en"	"en"
„	„ „ ..	"un"	"une"
„	6 from bottom	"à"	"a"
„	9 „ „	"privée"	"privé"
145	note (9) ..	"p. 448."	"p. 726."
109	7 from bottom	"vendor"	"vendee"
201	8 „ „	"Willes, J.,"	"Bovill, C. J.,"
464	16 „ „	"hopeless"	"helpless"
751	note (1) ..	"the current rate of insurance a vessel classed A. 1." ..	"the current rate of insurance *of* a vessel classed A. 1."
787 and 789	note (1), and 4 from bottom	"Montague Smith, J." ..	"Mellor, J."

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Abbott *v.* Parfitt	346
Adelaide Marine Insurance Company, Gandy *v.*	746
Allen *v.* London and South Western Railway Company	65
Arnold *v.* Blaker (Ex. Ch.)	433
Atkins, Dutton *v.*	373

B.

Baily, Dignam *v.* (Ex. Ch.)	47
Bank of England, Pollard *v.*	623
Barnett, Smith *v.*	34
Bathurst, Coleman *v.*	366
Beadon *v.* Parrott	718
Beck *v.* Stringer	497
Blaker, Arnold *v.*	433
Bowditch *v.* Wakefield Local Board	567
Bowring *v.* Shepherd (Ex. Ch.)	309
Brandt, Sharman *v.*	720
Breslauer, Pellas, *v.*	438
Bridges *v.* North London Railway Company (Ex. Ch.)	377
Bristol and Exeter Railway Company, Tebbutt *v.*	73
Brown *v.* Nugent	693
—— Smith *v.*	729
Bull *v.* O'Sullivan	209
Burke *v.* Lechmere	297

C.

	PAGE
Cambrian Railway Company, Reg. *v.*	422
Canterbury (Mayor of), Foreman *v.*	214
Carr, Gray *v.* (Ex. Ch.)	522
Clarke *v.* Stanford	357
Coates *v.* Collins	469
Cockerell, Reg. *v.*	252
Colam *v.* Hall	206
Coleman *v.* Bathurst	366
Collins, Coates *v.*	469
Cook *v.* Ipswich Local Board	451
—— Jones *v.*	505
Cooke, Petty *v.*	790

D.

Davis *v.* Hedges	687
Dignam *v.* Baily (Ex. Ch.)	47
Droitwich Union, Stourbridge Union *v.*	769
Drummond *v.* Sant	763
Dutton *v.* Atkins	373
—— *v.* Marsh	361

E.

East London Waterworks Company *v.* Leyton Sewer Authority	669
Elkington, Partridge *v.*	82

PAGE

English Fisheries Commissioners, Gore *v.* 561
Evans *v.* Hallam 713
Eyre, Phillips *v.* (Ex. Ch.) 1

F.

Ferguson, Ex parte 280
Foreman *v.* Mayor of Canterbury 214
Forster, Musgrave *v.* 590
Fox, Marshall *v.* 370
France *v.* Gaudet 199

G.

Gandy *v.* The Adelaide Marine Insurance Company 746
Garetty *v.* Potts 86
Garland *v.* Mead 441
Gaudet, France *v.* 199
Godard *v.* Gray 139
Gore *v.* English Fisheries Commissioners 561
Grand Junction Canal Company *v.* Overseers of Hemel Hempstead 173
——— *v.* Overseers of King's Langley 173
Gray *v.* Carr (Ex. Ch.) 522
—— Godard *v.* 139
Great Western Railway Company, Macrow *v.* 612

Wiltshire Iron Company *v.* 101, 776
Griffiths *v.* Longdon and Eldersfield Drainage Board 738
Guardians of Stourbridge Union *v.* The Guardians of Droitwich Union 769

H.

Halifax Local Board, Hirst *v.* 181
Hall, Colam *v.* 206
Hallam, Evans *v.* 713
Hammersmith Bridge Company *v.* Overseers of Hammersmith 230
Harber, Jones *v.* 77

PAGE

Hedges, Davis *v.* 687
Hemel Hempstead (Overseers of), Grand Junction Canal Company *v.* 173
Hirst *v.* Halifax Local Board 181
——— *v.* Molesbury 130
Hughes, Smith *v.* 597
Hutchinson, Rawnsley *v.* 305

I.

Ionides *v.* Pacific Insurance Company 674
Ipswich Local Board, Cook *v.* 451

J.

Jarrow Local Board of Health *v.* Kennedy 128
Jones *v.* Cook 505
——— *v.* Harber 77
——— *v.* St. John's College, Oxford 115
Judge, Selmes *v.* 724

K.

Kearney *v.* The London, Brighton, and South Coast Railway Company 759
Kennedy, Jarrow Local Board *v.* 128
Kent Justices, Reg. *v.* (Mercer's Appeal) 132
King's Langley (Overseers of), Grand Junction Canal Company *v.* 173

L.

Lancashire (Justices), Reg. *v.* 97
Latter *v.* White (Ex. Ch.) 474
Lechmere, Burke *v.* 297
Leyton Sewer Authority, East London Waterworks Company *v.* 669
Lister, Pape *v.* 242
Livesey, Reg. *v.* 129, n (2)
Littlechild, Reg. *v.* 293
London, Brighton, and South Coast Railway Company, Kearney *v.* 759

PAGE

London and South Western Railway Company, Allen *v.* 65
Longdon and Eldersfield Drainage Board, Griffiths *v.* 738
Lucas, Watts *v.* 226

M.

Macrow *v.* Great Western Railway Company 612
Marsh, Dutton *v.* 361
Marshall *v.* Fox 370
——— *v.* Murgatroyd 31
Mason *v.* Shrewsbury and Hereford Railway Company 578
Mead, Garland *v.* 441
Mercer's Appeal, Re 132
Metropolitan Board of Works *v.* Overseers of West Ham 193
———
Stebbing *v.* 37
Metropolitan District Railway Company, Reg. *v.* 698
Middlesex (Justices), Reg. *v.* 220, 781
Molesbury, Hirst *v.* 130
Moseley *v.* Rendell 338
Murgatroyd, Marshall *v.* 31
Musgrave *v.* Forster 590

N.

Neath (Overseers), Reg. *v.* 707
Nicholson *v.* Williams 632
North Eastern Railway Company, Wanless *v.* (Ex. Ch.) 481
North London Railway Company, Bridges *v.* (Ex. Ch.) 377
Nugent, Brown *v.* 693

O.

O'Sullivan, Bull *v.* 209

P.

Pacific Insurance Company, Ionides *v.* 674
Paddington (Vestry), Sawyer *v.* 164

PAGE

Pape *v.* Lister 242
Parfitt, Abbott *v.* 346
Parrott, Beadon *v.* 718
Partridge *v.* Elkington 82
Pellas *v.* Breslauer 438
Petty *v.* Cooke 790
Phillips *v.* Eyre (Ex. Ch.) 1
Pilgrim, Reg. *v.* 879
Pollard *v.* Bank of England 623
Poor Law Board, Reg. *v.* 785
Portbury, Toleman *v.* 215
Postmaster-General, Wadham *v.* 644
Potts, Garetty *v.* 86
Price, Reg. *v.* 411

R.

Rawnsley *v.* Hutchinson 305
Reg. *v.* Cambrian Railway Company 422
——— *v.* Cockerell 252
——— *v.* Justices of Middlesex 220, 781
——— *v.* Kent Justices, Re Mercer's Appeal 132
——— *v.* Lancashire Justices 97
——— *v.* Littlechild 293
——— *v.* Livesey 129, n (2)
——— *v.* Mayor of Sheffield 652
——— *v.* Metropolitan District Railway Company 698
——— *v.* Overseers of Neath 707
——— *v.* Pilgrim 89
——— *v.* The Poor Law Board 785
——— *v.* Price 411
——— *v.* Stanger 352
——— *v.* St. Luke's, Chelsea 572
Rendell, Moseley *v.* 338
Rhymney Railway Company, Thomas *v.* (Ex. Ch.) 266
Richardson *v.* Williamson 276
Roads *v.* Trumpington 56

S.

St. Luke's, Chelsea, Reg. *v.* 572
St. John's College, Oxford, Jones *v.* 115

PAGE

Sant, Drummond *v.* 763
Sawyer *v.* The Vestry of Paddington 164
Schibsby *v.* Westenholz 155
Selmes *v.* Judge 724
Sharman *v.* Brandt 720
Sheffield (Mayor), Reg. *v.* 652
Shepherd, Bowring *v.* (Ex. Ch.) 309
Shrewsbury and Hereford Railway Company, Mason *v.* 578
Smith *v.* Barnett 34
—— *v.* Brown 729
—— *v.* Hughes 597
—— Wadsworth *v.* 332
Stanford, Clarke *v.* 357
Stanger, Reg. *v.* 352
Stebbing *v.* Metropolitan Board of Works 37
Stourbridge Union, Droitwich Union *v.* 769
Stringer, Beck *v.* 497

T.

Tebbutt *v.* Bristol and Exeter Railway Company 73
Thomas *v.* Rhymney Railway Company (Ex. Ch.) 266
—— Tollett *v.* 514
Toleman *v.* Portbury 245
Tollett *v.* Thomas 514
Trumpington, Roads *v.* 56
Tyson's Appeal, Re 97

W.

Wadham *v.* Postmaster-General 644
Wadsworth *v.* Smith 332
Wakefield Local Board, Bowditch *v.* 567
Wanless *v.* North Eastern Railway Company (Ex. Ch.) 481
Watts *v.* Lucas 226
West Ham, Metropolitan Board of Works *v.* 193
Westenholz, Schibsby *v.* 155
White, Latter *v.* (Ex. Ch.) 474
Williams, Nicholson *v.* 632
Williamson, Richardson *v.* 276
Wiltshire Iron Company *v.* Great Western Railway Company 101, 776

TABLE OF CASES CITED.

A.

		PAGE
Aggs *v.* Nicholson	1 H. & N. 165	362, 363
Agra and Masterman's Bank, In re	Law Rep. 2 Eq. 674	111
Aiken *v.* Short	1 H. & N. 210	627
Alderson *v.* Temple	4 Burr. at p. 2239	79
Alexander *v.* Sizer	Law Rep. 4 Ex. 102, at p. 105	362, 363
Allen *v.* Carter	Law Rep. 5 C. P. 414	475
Amalia, The	1 Moo. P. C. (N.S.) 471	731
Anderson's Case	Law Rep. 3 Eq. 337	778
Angell *v.* Paddington	Law Rep. 3 Q. B. 714, at p. 718	570, 571
Archbold *v.* Scully	9 H. L. C. 360	763
Arkwright *v.* Gell	5 M. & W. 203	579, 584
Aspinall *v.* Wake	10 Bing. 51	340, 341, 347, 349
Attorney General *v.* Mayor of Norwich	2 My. & Cr. 406, 425	656, 664, 668
——— *v.* Mayor of Wigan	Kay, 268	656, 659, 664, 667
Austin *v.* Bunyard	6 B. & S. 687, 695	210
Azemar *v.* Casella	Law Rep. 2 C. P. 431	601

B.

Backhouse *v.* Bonomi	9 H. L. C. 503	579
Bailey *v.* De Crespigny	Law Rep. 4 Q. B. at p. 186	647
Ballantine *v.* Golding	Cooke's Bankrupt Law, 487	30
Bank of Australasia *v.* Harding	9 C. B. 661	150
——— *v.* Nias	16 Q. B. 717, 737	145, 150, 156
Bannister *v.* Breslauer	Law Rep. 2 C. P. 497	528, 536, 546, 549
Barton *v.* Fitzgerald	15 East, 530	472
Bartonshill Coal Company *v.* Reid	3 Macq. at pp. 276, 277	76
Basten *v.* Butter	7 East, 479	689
Bastow, In re	Law Rep. 4 Eq. 681	779
Bates *v.* Hewitt	Law Rep. 2 Q. B. 595	749, 755, 757, 758, 759
Bayley *v.* Wilkinson	16 C. B. (N.S.) 161, at p. 189	459, 467
Beaumont *v.* Barrett	1 Moo. P. C. 59, at p. 75; 6 St. Tr. 1349; 20 St. Tr. 301	7, 18
Beckford *v.* Wade	17 Ves. 87, 95	19, 768
Becquet *v.* MacCarthy	2 B. & Ad. 951	156
Beilby *v.* Raper	3 B. & Ad. 284	637

		PAGE
Belasco *v.* Hannant	3 B. & S. 13	371
Belfast and Ballymena Railway Company *v.* Keys	9 H. L. C. 556	621
Berwick, Mayor of *v.* Oswald	3 E. & B. at pp. 665, 679	647
Beta, The	Law Rep. 2 P. C. 447	736, 737
Bilbao, The	Lush. 149	286, 731
Bills *v.* Smith	6 B. & S. 314	78
Bird *v.* Bolter	4 B. & Ad. 443	722
Birkett *v.* Whitehaven Railway Company	4 H. & N. 730	269, 271
Birley *v.* Gladstone	3 M. & S. 205	530, 543
Bissell *v.* Briggs	9 Mass. R. 462	156
Blad *v.* Bamfield	3 Swan. 604	29
Blad's Case	3 Swan. 603	29
Blanchard *v.* Russell	13 Mass. Rep. 1	10
Blissett *v.* Hart	Willes, 508, 512, n.	426
Blundell *v.* Catterall	5 B. & A. 268, 315	436
Blyth *v.* Birmingham Waterworks Company	11 Ex. 781	761
Bodley *v.* Reynolds	8 Q. B. 779	200, 201, 202, 205
Bolingbroke *v.* Kerr	Law Rep. 1 Ex. 222	341, 344, 346, 347, 350, 351
Bottomley *v.* Fisher	1 H. & C. 211	362
Bowman *v.* Middleton	1 Bay, 252	8
Bradley *v.* Eyre	11 M. & W. 432, 451	144
Brand *v.* Hammersmith Railway Company	Law Rep. 4 H. L. 171; Law Rep. 2 Q. B. at p. 238	426, 427, 428, 430, 431, 432, 433
Briggs *v.* Oliver	35 L. J. (Ex.) 163	74
British Columbia Saw Mill Company *v.* Nettleship	Law Rep. 3 C. P. at p. 506	201
Brook, Re	16 C. B. (N.S.) 403	336
Broughton *v.* Manchester Waterworks Company	3 B. & Ald. 1, 10	210
Brown *v.* M'Kinally	2 Esp. 278	692
Bryne *v.* Boadle	2 H. & C. 722	74
Buchanan *v.* Rucker	1 Camp. 63; 9 East, 192	160
Buxton *v.* North Eastern Railway Company	Law Rep. 3 Q. B. 549	268, 270, 271, 273

C.

Cahill *v.* London and North Western Railway Company	13 C. B. (N.S.) 818	614, 615, 619, 621
Calder *v.* Bull	3 Dallas, 386, at p. 391	8, 10, 26
Calvin's Case	7 Co. Rep. 25 b.	7
Campbell *v.* Hall	Cowp. 204, at p. 209; 20 St. Tr. 239	7, 10
Carter *v.* Boehm	3 Burr. at p. 1910	756
Case of Arms	Popham, 121	15
Case *v.* Story	Law Rep. 4 Ex. 319	358, 359, 361
Castrique *v.* Imrie	8 C. B. (N.S.) 405, 419; Law Rep. 4 H. L. 414, at p. 445	145, 149, 152, 153
Catherwood *v.* Chabaud	1 B. & C. 150	340
Cattlin *v.* Hills	8 C. B. 123	731
Cavan *v.* Stewart	1 Stark. N. P. 525	156

		PAGE
Chambers *v.* Miller	13 C. B. (N.S.) 125	627, 631
Chapman *v.* Shepherd	Law Rep. 2 C. P. 228	319
Chapman's Case	Law Rep. 1 Eq. 346	111
Chappel *v.* Comfort	10 C. B. (N.S.) 802, 810	538, 539, 540
Charles River Bridge *v.* Warren Bridge	11 Peters, 420	27
Chute *v.* Blennerhasset	16 Ir. C. L. App. 9	244
Clark, Ex parte	Law Rep. 7 Eq. 550	778
Cockle *v.* London and Brighton Railway Company	Law Rep. 5 C. P. 457, at p. 460	380, 382, 384
Coles *v.* Bristowe	Law Rep. 4 Ch. App. 3	319, 321, 324
Collen *v.* Wright	7 E. & B. 301; 8 E. & B. 647	277, 279
Collis *v.* Selden	Law Rep. 3 C. P. 495	74
Cook *v.* Leonard	6 B. & C. 351	726
Corby *v.* Hill	4 C. B. (N.S.) 556	74
Cornman *v.* Eastern Counties Railway Company	4 H. & N. 781	74, 380
Cory *v.* Thames Ironworks Company	Law Rep. 3 Q. B. 181	202
Cowell *v.* Watts	6 East, 405, at p. 409	340, 349
Cox *v.* Prentice	3 M. & S. 344	631
—— *v.* Troy	5 B. & A. 474	475
Crafter *v.* Metropolitan Railway Company	Law Rep. 1 C. P. 300	380
Craw *v.* Ramsey	Vaughan, 292	8
Crawford *v.* Whittal	1 Doug. at p. 4, n. 1	156
Croft *v.* Lumley	5 E. & B. 648	248
Crosby *v.* Wadsworth	6 East, 602	62, 64
Cross *v.* Pagliano	Law Rep. 6 Ex. 9	550
Cruse *v.* Paine	Law Rep. 4 Ch. App. 441; Law Rep. 6 Eq. 641	319, 329, 330

D.

Davis *v.* Curling	8 Q. B. 286	83
—— *v.* Haycock	Law Rep. 4 Ex. 373, at p. 382	318, 319, 322, 326, 327, 329, 330
—— *v.* Oswell	7 C. & P. 804	200, 202
Dean *v.* Hogg	10 Bing. 345	63
De Cosse Brissac *v.* Rathbone	2 H. & N. 301	145, 150, 162
Dell *v.* King	2 H. & C. 84	475
De Lovio *v.* Boit	2 Gallison, 398	731
Dendy *v.* Nicholl	4 C. B. (N.S.) 376	247, 248, 251
Dick *v.* Tolhausen	4 H. & N. 695	144
Dill *v.* Murphy	1 Moo. P. C. (N.S.) 487	8
Dimes *v.* Grand Junction Canal Company	3 H. L. C. 759, 786	22
Dobree *v.* Napier	2 Bing. N. C. 781	12, 29
Doe *v.* Birch	1 M. & W. 402	247
—— *v.* Crisp	8 A. & E. 779	445
—— *v.* Marchetti	1 B. & Ad. 715	646, 648
—— *v.* Massey	17 Q. B. 373	763
—— *v.* Meux	1 C. & P. 346	247
—— *v.* Oliver	2 Sm. L. C. 6th ed. pp. 448, 732	145, 150, 153
—— d. Hanley *v.* Wood	2 B. & A. 724	62, 64
—— *v.* Rock	Car. & M. 549; 4 M. & G. 30	768
Don *v.* Lippmann	5 C. & F. 1	156
Dorling *v.* Epsom Board	5 E. & B. 471	235, 236, 238, 240

		PAGE
Douglas *v.* Forrest	4 Bing. at p. 703	162, 163
Doulson *v.* Matthews	4 T. R. 503	28
Downing *v.* Capel	Law Rep. 2 C. P. 461	726
Doyle *v.* Falconer	Law Rep. 1 P. C. 328	8
Duckworth *v.* Alison	1 M. & W. 412	122

E.

Eddleston *v.* Francis	7 C. B. (N.S.) 568	569
Edwards *v.* Gabriel	6 H. & N. 701; 7 H. & N. 520	715
——— *v.* Grace	2 M. & W. 190	340, 348
——— *v.* London and North Western Railway Company	Law Rep. 5 C. P. 445, 450	67, 70, 71
Elliott *v.* Kemp	7 M. & W. 306	340
Elwell *v.* Grand Junction Railway Company	5 M. & W. 669	615
Elwood *v.* Bullock	6 Q. B. 383	437
Emanuel *v.* Robarts	9 B. & S. 121	211, 213
Emmerson's Case	Law Rep. 1 Ch. App. 433	319
English Joint Stock Bank, In re	Law Rep. 3 Eq. 341	111
Everard *v.* Kendall	Law Rep. 5 C. P. 428	286

F.

Fairlie *v.* Fenton	Law Rep. 5 Ex. 169	722
Farebrother *v.* Simmons	5 B. & Ald. 333	722
Fenton *v.* Hampton	11 Moo. P. C. 347	8
Ferrar *v.* London Commissioners of Sewers	Law Rep. 4 Ex. 1	574
Fisher *v.* Samuda	1 Camp. 190	691
Fitzgerald's Case	Law Rep. 5 Q. B. 1	414
Fitzpatrick *v.* Robinson	1 Hud. & Brooke, 585	436
Fletcher *v.* Dyche	2 T. R. 32	122
——— *v.* Peck	6 Cranch, at p. 142	10
Folliott *v.* Ogden	1 H. Bl. 123	10
Forster *v.* Mackreth	Law Rep. 2 Ex. 163	212
Foxley, Ex parte	Law Rep. 3 Ch. App. 515, 519	79
Foy *v.* London and Brighton Railway Company	18 C. B. (N.S.) 225	380
Freeman *v.* Cooke	2 Ex. at p. 663	607
——— *v.* Read	9 C. B. (N.S.) 301	306
Fry *v.* Chartered Bank of India	Law Rep. 1 C. P. 689	538

G.

Galsworthy *v.* Norman	21 L. J. (Q.B.) 70	244
Gandy *v.* Jubber	5 B. & S. 485	579
Garrard *v.* Tuck	8 C. B. at p. 251	767
Gaved *v.* Martyn	19 C. B. (N.S.) 732	579
General Steam Navigation Company *v.* British and Colonial Steam Navigation Company	Law Rep. 3 Ex. 330	638
——— *v.* Guillou	11 M. & W. 877, 894	161, 162
Gibblett *v.* Read	9 Mod. 459	344, 348

		PAGE
Giblin *v.* M'Mullen	Law Rep. 2 P. C. 317	74
Gibson *v.* Mayor of Preston	Law Rep. 5 Q. B. 218	215
Gillard *v.* Wise	5 B. & C. 134	627
Gladstone *v.* Birley	2 Mer. at p. 404	560
Glass *v.* Richardson	9 Hare, 698, at pp. 701, 703; 2 D. M. & G. 658	445, 446, 447, 450
Godard *v.* Gray	Law Rep. 6 Q. B. 139	158, 159
Goff *v.* Great Northern Railway Company	3 E. & E. 672	67
Graham *v.* Ewart	1 H. & N. 550, 563; 7 H. L. C. 331	596
Great Western Railway Company *v.* Blake	7 H. & N. 987	268, 270, 271, 272, 273, 274
Great Northern Railway Company *v.* Shepherd	8 Ex. 30	616, 619, 621
Green *v.* Davies	4 B. & C. 235	210
Greenland *v.* Chaplin	5 Ex. 243	202
Greenway *v.* Hurd	4 T. R. 553	726
Greig *v.* Bendeno	E. B. & E. 133	371
Grissell *v.* Bristowe	Law Rep. 4 C. P. 36	319, 321, 322, 324
Guldfaxe, The	Law Rep, 2 A. & E. 325	736

H.

Hackney and Lamberhurst Case	E. B. & E. at p. 45	233
Hadley *v.* Baxendale	9 Ex. 341	200
Halford *v.* Cameron's Coalbrook, &c., Company	16 Q. B. 442	363
Halley, The	Law Rep. 2 P. C. 193	12, 29
Hamer *v.* Sowerby	3 L. T. (N.S.) 734	243
Hamlet *v.* Richardson	9 Bing. 644	692
Harding, Ex parte	Law Rep. 3 Eq. 341	778
Hardwick *v.* Moss	7 H. & N. 136	726, 728
Harman *v.* Kingston	3 Camp. 150	683
Harris *v.* Baker	4 M. & S. 27	215
Harrold *v.* Great Western Railway Company	14 L. T. (N.S.) 440	380
Hartnall *v.* Ryde Commissioners	4 B. & S. 361	215
Hawkins *v.* Maltby	Law Rep. 4 Ch. Ap. 200	319
Hawthorn *v.* Newcastle, &c., Railway Company	3 Q. B. 734, n	779
Healey *v.* Story	3 Ex. 3	363
Heath *v.* Chilton	12 M. & W. at p. 637	349
Hermann *v.* Seneschal	13 C. B. (N.S.) 392	726, 728
Hilcoat *v.* Archbishops of Canterbury and York	10 C. B. 327	40, 43, 44, 45, 46
Hill *v.* Audus	1 K. & J. 263	731
—— *v.* Gray	1 Stark, 434	601
Hirst *v.* Molesbury	Law Rep. 6 Q. B. 130	517
—— *v.* Smith	7 T. R. 182	340, 343
Hodkingson *v.* Kelly	Law Rep. 6 Eq. 496	319
Hoey *v.* Felton	11 C. B. (N.S.) 142	202
Holford *v.* George	Law Rep. 3 Q. B. 639	564
Holland *v.* Russell	1 B. & S. 424	631
Holliday *v.* St. Leonard, Shoreditch	11 C. B. (N.S.) 192	215, 217
Holme *v.* Guppy	3 M. & W. 387	121

		PAGE
Holmes v. North Eastern Railway Company	Law Rep. 4 Ex. 254	74
Hope v. Meek	10 Ex. 829	715
Horsfall v. Thomas	1 H. & C. 90	605
Horsy v. Daniel	2 Lev. 161	144
Hosier v. Arundell	3 B. & P. 7-	341
Houlditch v. Donegall	2 Cl. & F. at p. 477	149
Hounsell v. Smyth	7 C. B. (N.S.) 731	74
Huber v. Steiner	2 Bing. N. C. 202	29
Hudston v. Midland Railway Company	Law Rep. 4 Q. B. 366 614, 621, 622	
Hull Dock Company v. Browne	2 B. & Ad. 43 637, 642	
—— Local Board v. Jones	1 H. & N. 489	189
Hulme v. Coles	2 Sim. 12	793
Huzzey v. Field	2 C. M. & R. at pp. 440, 441	426

I.

Ida, The	Lush. 6	731
Isle of Ely Case	10 Rep. 143, a	741
Ivimey v. Stocker	Law Rep. 1 Ch. Ap. 396	579

J.

Jefferys v. Boosey	4 H. L. C. 815	156
John v. Bacon	Law Rep. 5 C. P. 437, at pp. 441, 442	270
Johnson v. Hudson	11 East. 180, 182	210
Jones v. Carter	15 M. & W. 718, 725 247, 249, 250, 251	
—— v. Mersey Docks	11 H. L. C. 443	197
Joule v. Taylor	7 Ex. 58 83, 84	

K.

Keates v. Cadogan	10 C. B. 591	601
Kellock's Case	Law Rep. 3 Ch. Ap. 769	779
Kemble v. Farren	4 Bing. 141 121, 122, 123	
Kern v. Deslandes	10 C. B. (N. S.) 205	540
Key v. Matthias	3 F. & F. 279	213
Kidwelly Canal Company v. Raby	2 Price, 93	300
Kielly v. Carston	4 Moo. P. C. 63, at p. 84 7, 19	
King v. Boston	7 East, 481, n	689
—— v. Thom	1 T. R. 487	340
Kirchner v. Venus	12 Moo. P. C. 361, at p. 398 536, 541, 559	
Kynnaird v. Leslie	Law Rep. 1 C. P. 389	7

L.

Latch v. Rumner Railway Company	27 L. J. (Ex.) 155	270
Latter v. White	Law Rep. 5 Q. B. 622	474
Lawrence v. Great Northern Railway Company	16 Q. B. 643	579

		PAGE
Leadbitter *v.* Farrow	5 M. & S. 345, 349	362
Leconfield *v.* Dixon	Law Rep. 2 Ex. 202	592
Lee *v.* Griffin	1 B. & S. 272	341
Le Mesurier *v.* Vaughan	6 East, 382	686
Leete *v.* Hart	Law Rep. 3 C. P. 322	726
Level of Hull Case	2 Str. 1127	741
Lewis *v.* Hammond	2 B. & Ald. 206	36
Limpus *v.* London General Omnibus Company	1 H. & C. 526	67
Lindus *v.* Melrose	2 H. & N. 293; 3 H. & N. 177	278, 362, 363, 364
Lisburne *v.* Davies	Law Rep. 1 C. P. 259	763
London and Colonial Company, In re	Law Rep. 7 Eq. 550	111
London and North Western Railway Company *v.* Lindsay	3 Macq. 99	163
Lyne *v.* Leonard	Law Rep. 3 Q. B. 156	226, 227, 228

M.

Mackenzie *v.* Coulson	Law Rep. 8 Eq. 368	748, 749
Magor *v.* Chadwick	11 Ad. & E. 571	579
Malvina, The	Lush. 493	286, 734
Mangan *v.* Atterton	Law Rep. 1 Ex. 239	485
Mare *v.* Charles	5 E. & B. 978	277, 362
Marks *v.* Feldman	Law Rep. 5 Q. B. 275	78, 79
Marriot *v.* Hampton	7 T. R. 269	692
Marshall *v.* Broadhurst	1 Cr. & J. 403	340, 349
Masters *v.* Scroggs	3 M. & S. 447	234, 235
Matthew *v.* Ollerton	4 Mod. 226	722
Maubourquet *v.* Wyse	Ir. Rep. 1 C. L. 471	156
Maxted *v.* Paine	Law Rep. 4 Ex. 203, at p. 205; Law Rep. 6 Ex. 132	313, n, 319, 332
Mayhew *v.* Wardley	14 C. B. (N.S.) 550	296
Mayor of Exeter *v.* Warren	5 Q. B. 773	638
Mayor of London *v.* St. Andrew's	Law Rep. 2 C. P. 574	703
McLean *v.* Fleming	Law Rep. 2 H. L., Sc. 128	533, 541, 546, 551
M'Cance *v.* London and North Western Railway Company	3 H. & C. 343	270
Meeus *v.* Thellusson	8 Ex. 638	156
Melling *v.* Leak	16 C. B. 652	769
Mercer *v.* Peterson	Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104	81
——— *v.* Woodgate	Law Rep. 5 Q. B. 26	436, 437
Mersey Docks *v.* Gibbs	Law Rep. 1. H. L., at p. 111	215, 218
Metropolitan Board of Works *v.* Vauxhall Bridge Company	7 E. & B. 964, at p. 983	233, 235, 239
Midland Great Western Railway Company (Ireland) *v.* Gordon	16 M. & W. 804	300
Milvain *v.* Perez	3 E. & E. 495	527
M'Intosh *v.* Great Western Railway Company	2 De G. & S. 758; 2 Mac. & G. 74	335
Mody *v.* Gregson	Law Rep. 4 Ex. 49	601
Mondel *v.* Steel	8 M. & W. 858, at p. 870	688, 689, 690, 691
Morgan *v.* Brandrett	5 B. & Ad. 289	78

		PAGE
Moseley *v.* Rendell	Law Rep. 6 Q. B. 338	347, 351
Mostyn *v.* Fabrigas	Cowp. at p. 174	145
Muschamp *v.* Lancaster, &c. Railway Company	8 M. & W. at p. 430	271
Mytton *v.* Midland Railway Company	4 H. & N. 615	271

N.

National Manure Company *v.* Donald	4 H. & N. 8	579, 582, 583
——— Permanent Benefit Building Society, In re	Law Rep. 5 Ch. Ap. 309	277, 278
Nepean *v.* Doe d. Knight	2 M. & W. 894	767
Newington *v.* Levy	Law Rep. 5 C. P. at p. 612	794
Nicholson *v.* Lancashire and Yorkshire Railway Company	34 L. J. (Ex.) 84	74
Nicklin *v.* Williams	10 Ex. 259, 267	426
Nixon *v.* Albion Insurance Company	Law Rep. 2 Ex. 338	210
Nixon *v.* Green	3 H. & N. 695	300
Norway, The	Bro. & Lush. 226	527
Novelli *v.* Rossi	2 B. & Ad. 757	145, 150, 153

O.

Ogden *v.* Folliot	3 T. R. 726	7, 27
Oglesby *v.* Yglesias	E. B. & E. 930	527
Ord *v.* Fenwick	3 East, 103	340
Ouimit *v.* Henshaw	35 Vermont Rep. 605	614

P.

Paine *v.* Hutchinson	Law Rep. 3 Ch. Ap. 388	319
Parry, Ex parte	33 L. J. (Ch.) 245	109
——— *v.* Great Ship Company	4 B. & S. 556	748
Partridge *v.* Court	5 Price, 412	340
Paterson *v.* Paterson	Law Rep. 2 Eq. 31, 36	444
Pearson *v.* Goschen	17 C. B. (N.S.) 352	529, 530, 531, 533, 535, 536, 541, 545, 551, 558, 559
Pederson *v.* Lotinga	28 L. T. 267	527
Pennel *v.* Reynolds	11 C. B. (N. S.) 709	78
Peter *v.* Kendall	6 B. & C. 703, 710	426
Peto *v.* Overseers of West Ham	2 E. & E. 144	710, 711, 712
Petty *v.* Great Western Railway Company	Law Rep. 5 C. P. 461, n (1)	380, 383
Phelps *v.* London and North Western Railway Company	19 C. B. (N.S.) 321	614, 620
Phillips *v.* Eyre	Law Rep. 4 Q. B. 225	2
——— *v.* Hunter	2 H. Bl. at p. 410	146
——— *v.* Rodie	15 East, 547	531, 535, 542, 543, 544, 557, 559
Picton's Case	30 State Tri. 225	7
Plant *v.* Midland Railway Company	21 L. T. (N.S.) 836	380
Potter *v.* Brown	5 East, 124	30
——— *v.* Faulkner	1 B. & S. 800	76
Poulsum *v.* Thirst	Law Rep. 2 C. P. 449	726

		PAGE
Poulton *v.* Lattimore	9 B. & C. 259	688
—— *v.* South Western Railway Company	Law Rep. 2 Q. B. 534	67, 70
Praeger *v.* Bristol and Exeter Railway Company	Law Rep. 5 C. P. 460, n (1)	380, 383
Price *v.* Harrison	8 C. B. (N.S.) 617	243, 244
—— *v.* Taylor	5 H. & N. 540	362
Pritchard *v.* Hitchcock	6 M. & G. 151	793, 794, 795
Progress Insurance Company, In re	Law Rep. 9 Eq. 370	110

R.

Raffles *v.* Wichelhaus	2 H. & C. 906	609
Ramsay *v.* Allegre	7 Curtis, 401; 12 Wheaton, 611	731
Ranger *v.* Great Western Railway Company	5 H. L. C. at p. 88	22
Read *v.* Fairbanks	22 L. J. (C.P.) at p. 208	200
Readhead *v.* Midland Railway Company	Law Rep. 2 Q. B. at pp. 417, 419	269
Rees *v.* Berrington	2 Ves. 540; 2 Wh. & T. L. C. Eq. 3rd ed. 887	794
Reg. *v.* Acton	8 Q. B. 108	773
—— *v.* Baldwin	8 A & E. 168	353, 354, 355
—— *v.* Belton	11 Q. B. 379	306, 307, 308
—— *v.* Birmingham Waterworks Company	1 B & S. 84	672
—— *v.* Blane	13 Q. B. 769	32, 33
—— *v.* Cambridgeshire Justices	7 J. P. 306; 1 L. M. & P. 47	135, 136, 137, 138
—— *v.* Cambridge Union	1 B. & S. 61	306
—— *v.* Charlesworth	16 Q. B. 1012, 1020	436
—— *v.* Ely	5 E & B. 489	306, 308
—— *v.* Eyre	Finlason Rep. p. 101	10
—— *v.* Garland	Law Rep. 5 Q. B. 269	444, 445, 446
—— *v.* Glamorganshire Canal	3 E. & E. 186	173, 177, 178, 179, 180
—— *v.* Grand Junction Canal	7 W. R. 597	173, 176, 177, 178, 180
—— *v.* Great Northern Railway Company	14 Q. B. 25	426
—— *v.* Great Western Railway Company	Law Rep. 4 Q. B. 323	135
—— *v.* Hammersmith Bridge Company	15 Q. B. 369	235
—— *v.* Head	3 B. & S. 419; 32 L. J. (M. C.) 115	233, 235, 240
—— *v.* Hunnington	5 Q. B. 273	773, 774
—— *v.* Lancashire	Law Rep. 6 Q. B. 97	784
—— *v.* Lesley	Bell. C. C. 220	12, 29
—— *v.* Lightfoot	6 E. & B. 822	32, 33
—— *v.* Long	1 Q. B. 740	306
—— *v.* Mayor of Manchester	5 Q. B. 402	788, 789
—— *v.* —— Norwich	3 Q. B. 285; 8 A. & E. 633	788, 789
—— *v.* —— Warwick	8 Q. B. 926	656
—— *v.* Metropolitan Board of Works	Law Rep. 4 Q. B. 15	196, 197, 198
—— *v.* Midland Railway Company	4 E. & B. 958	710, 711, 712
—— *v.* Millis	10 Cl. & F. 534	25
—— *v.* Morrish	32 L. J. (M. C.) 245	62
—— *v.* Newborough	Law Rep. 4 Q. B. 585	656
—— *v.* Oldbury	4 A. & E. 167	775
—— *v.* Prest	16 Q. B. 32	656

		PAGE
Reg. *v.* Smith	3 E. & E. 383, 390	56, 62, 63
—— *v.* Southwark and Vauxhall Water Company	6 E. & B. 1008	671
—— *v.* St. Martin, New Sarum	9 Q. B. 241	773, 774, 775
—— *v.* Surrey	Law Rep. 5 Q. B. 466	255, 461
—— *v.* Sylvester	2 B. & S. 322	98
—— *v.* Thompson	5 Q. B. 477	656, 660
—— *v.* Thurlstone	1 E. & E. 502	367
—— *v.* Tipton	3 Q. B. 215	773, 774, 775
—— *v.* Westmark	2 Mood. & Rob. 305	188, 189, 192
—— *v.* West Riding	6 B. & S. 531; Law Rep. 5 Q. B. 33	221, 222, 223, 224, 306, 784
Reimers *v.* Druce	23 Beav. 145, 154	146
Rex *v.* Barnes	1 B. & Ad. 113	235
—— *v.* Brooke	9 B. & C. 915	135, 137
—— *v.* Clarke	Cowp. 610, 612	295
—— *v.* Commissioners of Appeal	3 M. & S. 133	92, 93
—— *v.* Commissioners of Sewers for Tower Hamlets	9 B. & C. 517	238, 743
—— *v.* Grand Junction Canal	1 B. & A. 289	176
—— *v.* Harding	2 Salk. 477	221
—— *v.* Hube	5 T. R. 542	295
—— *v.* Inhabitants of Wigan	1 W. Bl. 47	15
—— *v.* Jeffreys	1 B. & C. 604.	92
—— *v.* Leake	5 B. & Ad. 469	437
—— *v.* Mein	3 T. R. 596.	353, 354, 355
—— *v.* Netherthong	2 B. & Ald. 179	188
—— *v.* St. Austell	5 B. & A. 693	62, 64
—— *v.* Tower Hamlets Commissioners	9 B & C. 517, 521	234, 238
—— *v.* Vaughan	4 Burr. at p. 2500	7
—— *v.* Willett	6 T. R. 294	353, 354, 356
—— *v.* Woolmer	12 A. & E. at p. 422	353
Ricket *v.* Metropolitan Railway Company	Law Rep. 2 H. L. 175	426, 427, 428
Rigby *v.* Hewett	5 Ex. 240	202
Rigge *v.* Burbidge	15 M & W. 598	688
Robert Pow, The	Bro. & Lush, at p. 102	735
Roberts *v.* Bury Commissioners	Law Rep. 4 C. P. 755; Law Rep. 5 C. P. 310	121, 122, 124, 126
——— *v.* Orchard	2 H. & C. 769	726, 728
Robins *v.* Jones	15 C. B. (N.S.) 221	437
Robinson *v.* Touray	3 Camp. 158	683
Rolla, The	6 Rob. Adm. 364	24
Rooke's Case	5 Rep. 99, b.	238
Rossi *v.* Bailey	Law Rep. 3 Q. B. 621	475, 688
Roswell *v.* Prior	12 Mod. 635	579, 585
Rudge *v.* Bowman	Law Rep. 3 Q. B. 689	319
Russell *v.* Bandeira	13 C. B. (N.S.) 149	121
——— *v.* Niemann	17 C. B. (N. S.) 163	527
——— *v.* Smyth	9 M. & W. at p. 819	159
Rust *v.* Cooper	Cowp. at p. 632	78
Ryder *v.* Wombwell	Law Rep. 4 Ex. 32	394, 761

S.

Samuell *v.* Hawarth	3 Mer. 272	794
Sankey Brook Coal Company *v.* Marsh	Law Rep. 6 Ex. 185	778
Scott *v.* Corporation of Liverpool	3 De G. & J. 334, 368	335
—— *v.* Littledale	8 E. & B. 815	609

		PAGE
Scott *v.* London Dock Company	3 H. & C. 596	391, 392
—— *v.* Pilkington	2 B. & S. 11, at p. 42	145, 151
—— *v.* Seymour	1 H. & C. 219	9
Shadwell *v.* Shadwell	6 C. B. (N. S.) 679	243, 244
Sheppard *v.* Murphy	Ir. Rep. 2 Eq. 544, at p. 569	321, 327
Shrubsole *v.* Sussams	16 C.B. (N. S.) 452	78
Simpson *v.* Fogo	1 John. & H. 18; 1 H. & M. 195	145, 162
Siner *v.* Great Western Railway Company	Law Rep. 4 Ex. 117	380, 382, 384, 385
Skelton *v.* London and North Western Railway Company	Law Rep. 2 C. P. 631	485
Smith, Ex parte	1 B. & S. 412	255
—— *v.* Great Eastern Railway Company	Law Rep. 2 C. P. 4	74
—— *v.* Hopper	9 Q. B. 1005	726
—— *v.* Sieveking	4 E. & B. 945	532, 537, 539 543, 553
Snook *v.* Mattock	5 A. & E. 239	144
Soady *v.* Wilson	3 Ad. & E. 248, 263	234, 235, 240, 241
Southampton and Itchin Bridge *v.* Southampton Local Board	8 E. & B. 801	215
Southcote *v.* Stanley	1 H. & N. 247	74, 76
Stafford *v.* Hamston	2 B. & B. 691	234
Staffordshire Canal *v.* Birmingham Canal	Law Rep. 1 H. L. 254	579
Stapley *v.* London and Brighton Railway Company	Law Rep. 1 Ex. 21	485, 488, 492, 493
Steele *v.* Waller	28 Beav. 466	445, 446
Stevenson *v.* Newnham	13 C. B. 285	78
Stone *v.* Strange	3 H. & C. 541	244
Stray *v.* Russell	1 E. & E. 888, 916	319
Street *v.* Blay	2 B. & Ad. 456	688
—— *v.* Morgan	Not reported	322
Stubley *v.* London and North Western Railway Company	Law Rep. 1 Ex. 13	485
Sutcliffe *v.* Booth	32 L. J. (Q.B.) 136	579
Sylph, The	Law Rep. 2 A. & E. 24, at p. 26	732, 736
Sylvester, Ex parte	9 B. & C. 61	295, 448

T.

Talley *v.* Great Western Railway Company	Law Rep. 6 C. P. 44	615, 618
Thackoorseydass *v.* Dhondmull	6 Moo. P. C. 300	13
Thames Tunnel Company *v.* Sheldon	6 B. & C. 341, 348	299, 303
Thomas *v.* Jones	5 B. & S. 916	228, 229
Thomson *v.* Davenport	2 Sm. L. C., at p. 344, 6th ed.	362
Thompson *v.* Gibson	7 M. & W. 456	579
—— *v.* Giles	2 B. & C. 422	627
Thorogood *v.* Bryan	8 C. B. 115	731
Thorp *v.* Cole	2 C. M. & R. 367	221
Thorpe *v.* Coleman	1 C. B. 990, 1000	517
Todmorden, Re	30 L. J. (Q.B.) 305	255
Toomey *v.* London and Brighton Railway Company	3 C. B. (N.S.) 146	380
Townley *v.* Gibson	2 T. R. 701	592

		PAGE
Trasher *v.* Everhart	3 Gill & John. (U. S. Rep. 234, 242	145
Trent & Humber Company, In re	Law Rep. 6 Eq. 396	778

U.

Uhla, The	Law Rep. 2 A. & E. 29, n.	735
Umphelby *v.* M'Lean	1 B. & A. 42	83
Union Cement Company, In re	Law Rep. 4 Ch. Ap. 627	110
United Ports Insurance Company	39 L. J. (Ch.) 146	112
Upstone *v.* Marchant	2 B. & C. 10	213

V.

Vallee *v.* Dumergue	4 Ex. 290	156
Vanquelin *v.* Bouard	15 C. B. (N.S.) 341, 368	145
Vauxhall Bridge Case	7 E. & B. 964, 983	232, 240
Vestry of St. Giles, Camberwell *v.* Weller	Law Rep. 6 Q. B. 168, n. 1	168, 170, 172

W.

Walker *v.* Bartlett	18 C. B. 845.	319
Wallington *v.* White	10 C. B. (N.S.) 128	187, 188, 192
——— *v.* Willes	16 C. B. (N.S.) 797	460
Ward *v.* Day	5 B. & S. 359, 363; 4 B. & S. 337	247, 248, 777
Warwick *v.* Rogers	5 Man. & G. 340	627
Waterford Railway Company *v.* Pidcock	8 Ex. 279	300
Waterhouse *v.* Keen	5 B. & C. 200	726
Watson *v.* Martin	34 L. J. (M. C.) 50	131
Webster *v.* Spencer	3 B. & Ald. 360	340
Weed *v.* Saratoga Railway Company	19 Wend. 534	271
Wegener *v.* Smith	15 C. B. 285	532, 538, 539, 543, 544, 553
Werner *v.* Humphreys	2 M. & G. 853	340, 343
West *v.* Dobb	Law Rep. 5 Q. B. 460	646
West London Extension Railway Company *v.* Fulham	Law Rep. 5 Q. B. 361	222
Westwood *v.* Secretary of State for India	11 W. R. 261; 7 L. T. (N.S.) 763; 1 N. R. 262	121, 122, 123, 126
Wheeler *v.* Metropolitan Board of Works	Law Rep. 4 Ex. 303	703
Whistler *v.* Forster	14 C. B. (N.S.) 248	213
Whittaker *v.* Manchester and Sheffield Railway Company	Law Rep. 5 C. P. 464, n. (3)	380
Wickham v. Hawker	7 M. & W. 63	592
Willes *v.* Wallington	13 C. B. (N.S.) 865	187, 192
Williams, Ex parte	5 Jur. 1133	353, 354, 355
——— *v.* Jarrett	5 B. & Ad. 32	213
——— *v.* Jones	13 M. & W. at p. 633	148, 159
——— *v.* Rose	Law Rep. 3 Ex. 5	52
Wilson *v.* Mayor of Halifax	Law Rep. 3 Ex. at p. 119	215
Wiltshire Iron Company, In re	Law. Rep. 3 Ch. Ap. 443, 446	109

		PAGE
Winsor *v.* Reg.	Law Rep. 1 Q. B. 390	295
Wolff *v.* Oxholm	6 M. & S. 92	9, 27
Wolverhampton Waterworks Company *v.* Hawkesford	6 C. B. (N.S.) 336; 7 C. B. (N. S.) 795, 815	300, 304
Wood *v.* Bell	5 E. & B. 772, at p. 789	201, 205
—— *v.* Waud	3 Ex. 748	584, 587
Woodhouse *v.* Murray	Law Rep. 2 Q. B. at p. 638	79
Wordsworth *v.* Harley	1 B. & Ad. 391	728
Wright *v.* Dannah	2 Camp. 203	722
—— *v.* Fitzgerald	27 State Trials, 759; Law Rep. 4 Q. B. at p. 232	11

Y.

Yelverton *v.* Yelverton	1 Sw. & Tr. 574	156
Young *v.* Davis	7 H. & N. 760	215
—— *v.* Fletcher	3 H. & C. 732	79, 81

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

MICHAELMAS TERM, XXXIV VICTORIA.

[IN THE EXCHEQUER CHAMBER.]

1870
June 23. (1)

PHILLIPS *v.* EYRE.

Action—Lex fori—Lex loci—Comitas gentium extended to colonies—Right of action in England for acts in foreign country—Effect in England of Act of Indemnity by colony—Governor of colony can legally give assent to a legislative enactment in his own favour—Power of Crown to create a local Legislature in a colony—Duty of Governor in case of Insurrection.

In bar to an action for assault and false imprisonment of the plaintiff in the island of Jamaica, the defendant pleaded, that since the grievances complained of an Act of Indemnity had been passed by the legislature of Jamaica, and assented to by the crown, which enacted that all personal actions, suits, indictments, prosecutions, and proceedings, present or future, against any persons for acts done in good faith after the proclamation of martial law in the suppression of a rebellion which had broken out in the island, should be discharged and made void, and that any person by whom such acts had been done should be acquitted and indemnified against the Queen and all other persons; and that the defendant, the governor of the island, and all acting under his authority, were indemnified in respect of all acts done in order to put an end to the rebellion, and such acts were made and declared to be lawful; that the grievances complained of were acts done within the scope of the Act.

The plaintiff replied, that the defendant, at the time of the passing of the Act,

---

(1) This case was decided in the sittings after Trinity Term.

1870

PHILLIPS v. EYRE.

was the governor of Jamaica, and was a necessary party to the passing of the Act, and the Act could not have become the law of Jamaica without the defendant's assent as governor. On demurrers to the plea and replication:—

Held: First, that the Crown had power to create a local legislature in a dependency of the Crown whether conquered, ceded, or settled. Secondly, that the Act of Indemnity was not repugnant to 11 & 12 Will. 3, c. 12, within the meaning of 28 & 29 Vict. c. 63, so far as the Act of Indemnity related to civil proceedings. Thirdly, that, although the Act of Indemnity was retrospective in its nature, it had effect without the limits of Jamaica so as to prevent an action from being brought in England, and therefore that the plea was good.

Held, also, that the governor of a colony could legally give his official assent to a legislative measure in which he is personally interested; and that the replication was therefore bad.

ERROR from the judgment of the Court of Queen's Bench in favour of the defendant on demurrer (1).

The writ in this action was issued on the 7th of November, 1867.

The first count was for an assault and false imprisonment of the plaintiff at his house in the island of Jamaica, and causing him to be conveyed to the court-house there on the 24th of October, 1865.

Second count, for an assault and false imprisonment at the said court-house on the 25th of October, 1865.

Third count, for an assault and false imprisonment, and for forcibly conveying the plaintiff handcuffed from his house to a place called Uppuck Camp, in the said island.

Fourth count, for an assault and imprisonment, and for forcibly conveying the plaintiff from Uppuck Camp to a certain place called the Ordnance Wharf.

Fifth count, for an assault and imprisonment, and for forcibly putting the plaintiff on board a ship called the *Wolverine*, and conveying him to a place called Morant Bay.

Sixth count, for an assault by beating and flogging the plaintiff.

Seventh count, for seizing and taking the goods and chattels of the plaintiff, and carrying them away and disposing of them to the defendant's use.

Pleas: 1. Not guilty.

2. That the defendant was captain-general and governor-in-chief of the island of Jamaica and the territories depending thereon, the same then and still being a colony or dependency of the

(1) Law Rep. 4 Q. B. 225.

British crown, by virtue of a commission from Her Majesty the now Queen of the United Kingdom of Great Britain and Ireland, under the great seal of the United Kingdom, and that divers persons in the island of Jamaica had conspired by force to overthrow the constitution and government in the island by law established, and in pursuance of the conspiracy great numbers of the inhabitants of the island had broken out into open rebellion, and had committed many burglaries, robberies, arsons, murders, and other felonies, and the civil power of the island had been overpowered by the rebels, and the defendant, with the assistance and co-operation of the military and naval forces of the Queen and of her faithful subjects in the island, had, by force of arms, arrested the progress of the rebellion, and afterwards, and after the rebellion had been so arrested, a certain Act of Parliament was made and passed by the governor, Legislative Council, and House of Assembly of the island of Jamaica, in the twenty-ninth year of the now Queen (1865–66), for the purpose of indemnifying the defendant and all other officers and persons concerned in arresting the rebellion in the island by such force of arms as aforesaid, which Act is in the words and figures following:—

"Whereas, being seduced by the insidious counsel of wickedly designing persons, many of the Queen's subjects in this island conspired by force to overthrow the constitution and government here established by law, and in furtherance of such their purposes, did with force, and in confederated multitude, commit on the 11th day of October, in this present year of our Lord 1865, and on divers other days then following, in the parish of St. Thomas-in-the-East, many burglaries, robberies, arsons, murders, and other felonies, with treasonous purpose, in renunciation of their natural allegiance, and to the intent of the general massacre of all loyal and well-disposed subjects of the Queen here dwelling. And whereas upon being informed of such the aforesaid atrocities, his Excellency Edward John Eyre, Esq., the governor of this island, with the advice of a council of war, and in order to prevent the extension of the rebellious outbreak, did proclaim that martial law should obtain and prevail throughout the county of Surrey, with the exception only of the city and parish of Kingston. And whereas, under God's providence, the military and naval forces of

1870

PHILLIPS v. EYRE.

the Queen, with the loyal co-operation of others her Majesty's faithful subjects in this island, have arrested the spread of this rebellion and saved the lives of law-abiding citizens from imminent general sacrifice. And whereas military, naval, or civil authorities necessarily employed in the prompt suppression of the atrocities aforesaid, may, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose of restoring public peace and quelling the rebellion. And whereas it is expedient that all persons, whosoever in good faith and of loyal resolve have acted for the crushing of this rebellious outbreak, should be indemnified and kept harmless for such their acts of loyalty. Be it therefore, and it hereby is enacted by the governor, legislative council, and assembly of this island, first, that all personal actions, and suits, indictments, information, attachments, prosecutions and proceedings, present or future, whatsoever against such authorities or officers, civil, military, or naval, or other persons acting as last aforesaid, for or by reason of any matter or thing commanded, ordered, directed or done, since the promulgation and publication of the proclamation of martial law aforesaid, whether done in any district in which martial law was proclaimed, or in any district in which martial law was not proclaimed, in furtherance of martial law, that is to say, on, from, and after the 13th day of October last past, and during the continuance of such martial law, in order to suppress the insurrection and rebellion, and for the preservation of the public peace throughout the island, shall be discharged and made void, and that every person by whom such act, matter, or thing shall have been advised, commanded, ordered, directed, or done for the purposes aforesaid, on, from, and since the 13th day of October, and during the existence of such martial law, shall be freed, acquitted, discharged, and indemnified, as well against the Queen's most gracious Majesty, her heirs and successors, as against all and every person and persons whomsoever.

"And it is hereby also enacted, that his Excellency Edward John Eyre, Esq., captain-general, and governor-in-chief, and all officers and other persons who have acted under his authority, or have acted bonâ fide for the purposes and during time aforesaid, whether such acts were done in any district in which martial law

was proclaimed, or in any district in which such martial law was not proclaimed, are hereby indemnified in respect of all acts, matters, and things done in order to put an end to the rebellion, and such acts so done are hereby made and declared to be lawful and are confirmed.

"In order to prevent any doubt which might arise, whether any act alleged to have been done under the authority of the governor, or to have been done bonâ fide, in order to suppress and put an end to the rebellion was so done, it shall be lawful for the governor for the time being to declare such acts to have been done under such authority, or bonâ fide for the purposes aforesaid, and such declaration by any writing under the hand of the governor for the time being, shall in all cases be conclusive evidence that such acts were so done respectively."

That by the laws and constitution of the island, the governor, legislative council and assembly of the island, had power and authority to make and pass the Act, subject to the assent of the Queen thereto; and that afterwards the Act duly received the assent of Her Majesty, and all conditions in that behalf to be performed having been performed, and all things necessary to be done having been done, and all times necessary to elapse having elapsed, the Act became and was, and is part of the law of the island of Jamaica. That the person in the Act called his Excellency Edward John Eyre, Esq., was and is the defendant, and that the alleged grievances in the declaration mentioned were committed in the island of Jamaica after the 13th of October, 1865, and during the continuance of the rebellion, and before the passing of the Act, and were measures used in the suppression of the rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting an end to the rebellion, and were matters and things bonâ fide done in order to put an end to the rebellion, and are included in the indemnity given by the Act.

Replications: 1. Issue joined on the pleas.

2. Demurrer to the second plea and joinder.

3. To the second plea, that the plaintiff sues not only for the trespasses as are complained of and not included in the Act, but for other trespasses on other occasions, for longer periods of time,

1870

PHILLIPS v. EYRE.

and in other places than are attempted to be justified or excused, and in excess of the alleged right or excuse.

4. As to the second plea, so far as it relates to divers of the trespasses committed on the high seas, and mentioned in the fifth count, the plaintiff says that the trespasses were committed beyond the territorial limits within which the Jamaica legislature had at the times or at the time when the Act was made and passed jurisdiction or authority.

5. To the defendant's second plea, that the defendant, at the time of the making and passing of the Act in the plea set forth, was the governor of the island of Jamaica and the territories thereon depending, and was then present in the island, and was then acting in such capacity of governor of the island, and is the governor referred to in the Act, in the words "Be it therefore, and is hereby enacted by the governor, legislative council, and assembly of this island;" and was by the law and constitution of Jamaica, himself a necessary party to the making and passing of the Act; and the Act, so far as it became the law of Jamaica was, by virtue of his consent as such governor, acting with the council and assembly, and could not have become the law of Jamaica, without the consent of the defendant as such governor.

Demurrer to the fifth replication and joinder.

Feb. 2 and 3. *Quain, Q.C.* (*J. H. Payne,* with him), for the plaintiff. First, the legislature of Jamaica being a mere subordinate and dependent legislature, has no power to pass an Act of indemnity depriving any one of the Queen's subjects without compensation of all remedy for wrongs committed upon him. The Jamaica legislature was not created by any Act of parliament; it was created by charter granted under the great seal, accompanied by instructions. The crown has no powers to create a legislature capable of passing a valid Act of indemnity, because colonial legislatures, whether they are created by charter or Act of parliament, are, primâ facie, subordinate bodies with limited powers, and though the imperial parliament may create a legislature with authority to pass an Act of indemnity, that is beyond the competence of the crown. It is clear from Story's Commentaries on the American Constitution, vol. i., pp. 171, 185, that the powers exerciseable by

the Jamaica legislature must be sought for in the charter and instructions granted to that colony. An account of the charters granted to Jamaica, beginning with the year 1660 (O. S.), will be found in Chambers' Opinions, vol. i. p. 206. In *Campbell* v. *Hall* (1), Lord Mansfield treats Jamaica as a settled colony, while, on the other hand, Lord Wensleydale, in *Beaumont* v. *Barrett* (2), treats it as a conquered colony; but whether a conquered or a settled colony, the Crown did issue a commission to create an assembly subject to the provisions contained in the instructions which accompanied it; but the Crown could not confer upon the legislature authority to pass an Act of indemnity; it could not do so in express terms, and certainly not by implication: *Campbell* v. *Hall.* (3) It is clear that the Crown could not confer the power to pass a bill of attainder. No colony has ever passed such an Act. The fact that they have never done so is strong evidence that they have not this power. The North American colonies, after the rebellion commenced and before their recognition, passed such Acts, but in this country such Acts were held to be nullities: *Ogden* v. *Folliot.* (4)

[WILLES, J. In a foreign sovereign state an Act of attainder has no validity, as the Court of Common Pleas held in *Kynnaird* v. *Leslie.* (5)]

This Act of indemnity is tantamount to a bill of attainder, which is a statute depriving a subject of his previously existing rights. Neither can the crown confer on colonial legislatures a power to inflict torture: *Picton's Case* (6); nor to make legitimate a bastard; and it was a question whether they could pass an Act to naturalize an alien; for the king cannot grant to any other to make of strangers born denizens: it is by the law itself so inseparably and individually annexed to his royal person: *Calvin's Case* (7); but the power to naturalize has been expressly conferred on all colonies by 10 & 11 Vict. c. 83. It is now well settled that the legislature of a colony cannot commit for contempt: *Beaumont* v. *Barrett* (8), overruled by *Kielly* v. *Carston* (9); *Fenton* v.

(1) Cowp. 204. See also *Rex* v. *Vaughan*, 4 Burr. at p. 2500.
(2) 1 Moo. P. C. at p. 75.
(3) Cowp. at p. 209.
(4) 3 T. R. 726.
(5) Law Rep. 1 C. P. 389.
(6) 30 State Tri. 225.
(7) 7 Co. Rep. 25 b.
(8) 1 Moo. P. C. 59.
(9) 4 Moo. P. C. 63.

1870

PHILLIPS v. EYRE.

Hampton (1); *Doyle* v. *Falconer* (2); *Dill* v. *Murphy.* (3) These cases shew how subordinate and dependent colonial legislatures are; they cannot protect themselves even by committing for contempt. *Bowman* v. *Middleton* (4) is a case where a statute of a colonial legislature being against common right and Magna Charta, was held invalid a century after it had been passed. This is a strong instance of the limited powers of dependent legislatures. The imperial legislature has power to pass an Act of indemnity only because it has judicial functions, such an Act being similar to an injunction granted by the Court of Chancery, as it stays the prosecution of an action without compensation; thus in *Calder* v. *Bull* (5), Chase, J., commenting on Acts of attainder and bills of pains and penalties, in effect says, that they are judgments of the legislature, and are passed in exercise of judicial functions. But, inasmuch as the power to commit is inseparable from the exercise of judicial functions in a court of record, colonial legislatures being without that power, as is clear from the cases already cited, are not judicial bodies. The legislature of Jamaica being created by charter from the Crown in a settled colony, had no power to pass an Act of indemnity, that power being reserved to the imperial legislature by reason of its judicial functions.

With regard to the Acts of indemnity which have been passed from time to time, and which are collected in the report of the case in the Court below, the Irish Acts do not form any precedent for the present Act. It is important to see if they were passed before 1783. Up to that time Ireland was treated as a conquered country: *Craw* v. *Ramsey* (6); since that time it has been declared an independent kingdom. See 22 Geo. 3, c. 53, and 23 Geo. 3, c. 28. Since this last Act, the Irish legislature was not a subordinate legislature, but omnipotent, and had the same right to pass Acts of indemnity as an imperial parliament; all the Irish Acts of indemnity, except the 3 Geo. 3, c. 19, were passed subsequent to 1783; but that Act is of slight operation. With regard to the Acts of indemnity passed by the different colonies,

(1) 11 Moo. P. C. 347.
(2) Law Rep. 1 P. C. 328.
(3) 1 Moo. P. C. (N.S.) 487.
(4) 1 Bay, 252.
(5) 3 Dallas, 386.
(6) Vaughan, 292.

their validity has never been questioned in an English court of justice; the fact of their having been passed is of no weight.

Secondly, the Act of Indemnity is void, on the ground that it is repugnant within the meaning of 28 & 29 Vict. c. 63, ss. 2 & 3, to 11 & 12 Will. 3, c. 12. The last-mentioned Act provides that the governor of a colony who oppresses British subjects shall be triable in England: the Act of Indemnity attempts to relieve the governor from liability to legal proceedings of every kind. It is therefore repugnant to the law of England.

Thirdly, even if the Act of Indemnity is valid in Jamaica, it can have no extra-territorial operation, and cannot be set up as a defence to an action in a court of justice in England for a wrong committed in Jamaica. The plaintiff had a right of action vested in him the moment the wrong was done. He could then have brought an action in Jamaica or in England; if he had an alternative remedy, the Jamaica legislature had no power to divest him of his remedy in England. The Court here will not consider whether any remedy exists in Jamaica for the wrong done to the plaintiff there: *Scott* v. *Seymour* (1).

Fourthly, even if the Act of Indemnity be valid in Jamaica and is to be adopted in this country by reason of comity, on the footing of foreign law, yet this doctrine does not extend to ex post facto legislation rendering acts legal which were previously illegal. The comity of nations only recognizes the law of the foreign country where the wrong was committed, as the law existed at the time when the wrong was done. It does not recognize subsequent legislation altering the character of the wrong, for it is against common right to take away, without compensation, a cause of action once vested. The best illustration on the present point, is the manner in which contracts made in foreign countries are dealt with: for, as no nation is bound to enforce any contract injurious to the interests of its subjects (Story's Confl. of Law, par. 244), so the wrongful discharge by the law of a foreign country from the liability on a contract entered into within its dominions, will not be recognized by an English court, *Wolff* v. *Oxholm* (2). In that case, the wrongful confiscation of a debt due to British subjects was held not to exempt the debtor from the payment of

(1) 1 H. & C. 219; 32 L. J. (Ex.) 61. (2) 6 M. & S. 92.

8 Jur. N.S. 568

1870

PHILLIPS v. EYRE.

the debt. Story on the Confl. of Laws, par. 337, citing *Blanchard* v. *Russell* (1), is to the same effect. A passage in the charge of Blackburn, J., in *Reg.* v. *Eyre* (2), seems to shew that the Act of Indemnity would be no answer to an indictment in England; the same reasoning is applicable to a civil action. They both stand on the same footing; if it is no answer to the one it is no answer to the other.

February 3, 4. *Mellish, Q.C.* (*H. S. Giffard, Q.C.*, and *Poland* with him), for the defendant. It is not correct that, where the colonial legislature has passed an Act of indemnity in favour of a governor for acts done there, the persons injured are remediless. They have two remedies. The Crown may disallow the Act, or the imperial parliament may declare it void as to England. As to the first point. With regard to the cases cited for the plaintiff, wherein it was decided that the colonial legislature have no power to commit for contempt, it is to be remarked, that they do not decide if a colonial legislature passed a statute empowering itself to commit, such a statute would be void. Those cases, however, when carefully examined, do decide that colonial legislatures possess supreme legislative power; but that power is subordinate to parliament. *Campbell* v. *Hall* (3) has no bearing on this case. It only decides, that after the Crown has created a legislature in a conquered colony, it loses its power of levying taxes by its own authority. It is rather an authority in favour of the defendant as shewing that a colonial legislature is an independent body. It is true that, according to the constitution of the United States, a state legislature has no power to pass an ex post facto law, and this means that no law can be passed which renders an act punishable in a manner in which it was not punishable when it was committed: Kent's Commentaries, vol. i., s. 408, p. 458, 10th ed., *Fletcher* v. *Peck* (4), *Calder* v. *Bull* (5). Neither does *Folliott* v. *Ogden* (6), bear on this point; it merely decided that a rebellious colonial legislature could not pass an Act of confiscation. It is conceded that there is no direct authority to guide the decision of this

(1) 13 Mass. Rep. 1.
(2) Finlason Rep. p. 101.
(3) Cowp. 204; 20 State Trials, 239.
(4) 6 Cranch, at p. 142.
(5) 3 Dallas, 386.
(6) 1 H. Bl. 123.

case: it is therefore important to bear in mind the course of legislation respecting Acts of indemnity. The fact that, from very early times, the parliament of England has passed such Acts, ought to have considerable weight. The first Act is 1 Edw. 3, st. 1, c. 1; but the Act passed in 5 Rich. 2, st. 1, c. 5, is very like the present. This Act is remarkable as shewing the early principle of the constitution, for it is admitted in the statute that, even when an insurrection of villeins was to be repressed, it was contrary to law to proceed against them otherwise than by process of the law. The Act itself is a complete Act of indemnity. Other Acts of indemnity will be found in the report of the case below (1). Then there are the Acts of indemnity passed by the Irish Parliament. The argument on the other side, with regard to these Acts, is not sound. If the cause of action in Ireland only was taken away by the Irish Acts, it would have been necessary, after the Great Rebellion in 1798, to pass an Act of indemnity in England; but that has never been thought requisite. The present Act appears to have been taken from 39 Geo. 3, c. 3, which deals not only with the future, but extends to actions then already commenced, and also to judgments recovered.

[MARTIN, B. Only one action brought for acts done during the great rebellion was successful.]

Wright v. *Fitzgerald* (2). The defendant, in that case, acted from private malice and not for the public good. Acts of indemnity have been passed in the colonies, for instance, New Zealand, St. Vincent, Ceylon, Antigua, and Lower Canada (3): in none of these cases has the Colonial Act been confirmed by the Imperial Parliament. When a colony is a pure Crown colony, and has no Assembly, there the Imperial Parliament has passed an Act; for instance, the 17 & 18 Vict. c. 37 is an Act passed by the Imperial Parliament, indemnifying the Chief Justice of the Mauritius, for having acted as judge in the Vice-Admiralty Court, without authority.

The next point is, is the Act of indemnity repugnant to the 11 & 12 Wm. 3, c. 12, within the meaning of 28 & 29 Vict. c. 63? The meaning of the word repugnant, as used in 28 & 29 Vict. c. 63,

(1) Law Rep. 4 Q. B. at p. 232. (2) 27 State Trials, 759.
(3) See Law Rep. 4 Q. B. at p. 232.

1870

PHILLIPS v. EYRE.

is, that when the imperial legislature has forbidden the colonial legislature to pass a particular statute, such a statute shall not hereafter be enacted in the colony; but under the provisions of that Act, every other kind of statute may be passed by the colonial legislature, and an Act of indemnity is not expressly forbidden. But even if the 28 & 29 Vict. c. 63, had not been passed, the Act of Indemnity could not be repugnant to 11 & 12 Wm. 3, c. 12. That Act does not in any way relate to civil proceedings; nor does it make an act an offence which was not one before. The law is, that a governor who was guilty of oppression in a colony could not be indicted in the colony as long as he was governor; and as, in all probability, the moment he ceased to be governor, he left the colony, and could only be indicted in England for acts committed in England, the only object of the Act was to allow a governor of a colony to be proceeded against for acts done abroad. Therefore the Act of Indemnity is in no way repugnant to the 11 & 12 Wm. 3, c. 12.

The other two questions must be taken together. The argument is, the moment the illegal act is committed in Jamaica, the injured person has a vested right to bring an action here, and that vested right cannot be taken away by legislation in Jamaica. The Court below have given a valid answer to that argument (1), where, after citing *Reg.* v. *Lesley* (2), and *Dobree* v. *Napier* (3), they come to the conclusion that, if the Acts had been rendered lawful by prospective legislation, no action would lie, and that the same principle, which is applicable to an act made lawful by previous legislation, is equally applicable to an act originally wrongful, but legalized by an ex post facto law. There is no difference in the law, as applicable to contracts made or torts committed abroad. The law with regard to torts is clearly laid down in the case of *The Halley* (4), that in order that an action may be maintained in the courts of this country for a wrong committed in a foreign country or colony, the wrong must be one for which an action can be maintained both in the foreign country and in this country. It is a fallacy to say that the right of action is vested in England; it is no more vested in England than it is at

(1) See Law Rep. 4 Q. B. at p. 239.
(2) Bell, C. C. 220; 29 L. J. (M. C.) 97.
(3) 2 Bing. N. C. 781.
(4) Law Rep. 2 P. C. 193.

New York or in Canada, or any other part of the world. If an action were brought anywhere else than in England, would not the Act of Indemnity be a bar? The comity of nations requires that a person indemnified by a law in one country for acts done in that country, shall be protected in every other country against legal proceedings in respect of those acts.

A different question arises on the replication; but it is conceded by the plaintiff's counsel that the governor of a colony had power to give his consent to an Act indemnifying himself.

Quain, Q.C., in reply. The powers of colonial legislatures are limited. The 15 & 16 Vict. c. 72, s. 19, contains a good exposition of the laws which are beyond the competence of a colonial legislature. It is conceded that the imperial legislature may give legislative bodies in dependencies supreme powers. See 30 & 31 Vict. c. 3, s. 94, and 24 & 25 Vict. c. 67. If the contention on the other side be right, the imperial legislature need not have passed 17 & 18 Vict. c. 37. The Mauritius was a conquered colony, and the power of the Crown was supreme. It is said that the Courts of England will not inquire into the validity of laws in foreign countries; but this is not in accordance with Story on the Conflict of Laws, s. 258.

[KELLY, C.B. *Thackoorseydass* v. *Dhondmull* (1) shews the great regard that is paid to the law, not only of foreign countries, but even of dependencies, however much it may be in conflict with the law of England.]

That case was an appeal from an action brought in India, and had to be decided by the law of India.

Cur. adv. vult.

June 23. The judgment of the Court (Kelly, C.B., Martin, Channell, Pigott, and Cleasby, BB., Willes and Brett, JJ.) was delivered by

WILLES, J. This is an action complaining of false imprisonment and other injuries to the plaintiff by the defendant in the island of Jamaica. The plea states in effect that the defendant was governor of the island; that a rebellion broke out there which the governor and others acting under his authority had arrested

(1) 6 Moo. P. C. 300.

1870

PHILLIPS v. EYRE.

by force of arms; that an Act was afterwards duly passed by the legislature of the island, and received the royal assent, by which, after reciting the rebellion, a proclamation of martial law within certain local limits by the governor with the advice of a council of war, that the rebellion had been suppressed and imminent general sacrifice of life thereby averted, that the military, naval, or civil authorities might, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose of restoring public peace and quelling the rebellion, and that all persons who in good faith and loyal resolve had acted for the crushing of the rebellious outbreak ought to be indemnified and kept harmless for such their acts of loyalty, it was enacted by the governor, legislative council, and assembly of the island, amongst other things that the defendant and all officers and other persons who had acted under his authority, or had acted bonâ fide for the purpose and during the existence of martial law, whether done in any district in which martial law was proclaimed or not, were thereby indemnified in respect of all acts, matters, and things done in order to put an end to the rebellion, and all such acts were "thereby made and declared lawful, and were confirmed." The plea further states that the grievances complained of in this action were measures used in the suppression of the rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting an end to, and bonâ fide done in order to put an end to, the rebellion, and so were included in the indemnity. To this plea the plaintiff demurred, and also replied that the defendant as governor was, by the law of Jamaica, a necessary party to the making of the Act. The defendant demurred to that replication, and issues in law were raised upon the validity of the plea and replication, upon which issues the Court of Queen's Bench gave judgment for the defendant, whereupon the plaintiff has assigned error.

The case was very fully argued at the sittings after Hilary Term, by Mr. Quain for the plaintiff and Mr. Mellish for the defendant, when we took time to consider.

It was agreed at the bar that, for the purpose of this argument, the decision ought to turn upon the Colonial Act, and numerous objections were urged against its validity and effect. Before dis-

cussing these objections in detail it may be convenient to consider generally the condition of the governor of a colony and other subjects of Her Majesty there in case of open rebellion. To a certain extent their duty is clear to do their best and utmost in suppressing the rebellion. Even as to tumultuous assemblies and riots of a dangerous character, though not approaching to actual rebellion, Tindal, C.J., in his charge to the Bristol grand jury on the special commission upon the occasion of the riots in 1832 (1), there, in accordance with many authorities, stated the law as to private citizens. "In the first place, by the common law every private individual may lawfully endeavour, of his own authority and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he may see coming up from joining the rest; and not only has he the authority, but it is his bounden duty, as a good subject of the king, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evildoers to keep the peace. Such was the opinion of all the judges in the reign of Queen Elizabeth in a case called the Case of Arms (2) (see *Rex.* v. *Inhabitants of Wigan*) (3), although the judges add that it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the king in doing this. It would undoubtedly be more advisable so to do, for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger was sufficiently immediate, or until some felony was committed, or could not be prevented without recourse to arms; and, at all events, the assistance given by men who act in subordination and concert with the civil magistrate will be more effectual to attain the object proposed than any efforts, however well intended, of separated and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly,

(1) 5 C. & P. at p. 262. (2) Popham, 121. (3) 1 W. Bl. 47.

1870

PHILLIPS v. EYRE.

and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law."

This perilous duty, shared by the governor with all the Queen's subjects, whether civil or military, is in an especial degree incumbent upon him as being entrusted with the powers of government for preserving the lives and property of the people and the authority of the Crown; and if such duty exist as to tumultuous assemblies of a dangerous character, the duty and responsibility in case of open rebellion are heightened by the consideration that the existence of law itself is threatened by force of arms and a state of war against the Crown established for the time. To act under such circumstances within the precise limits of the law of ordinary peace is a difficult and may be an impossible task, and to hesitate or temporize may entail disastrous consequences. Whether the proper, as distinguished from the legal, course has been pursued by the governor in so great a crisis, it is not within the province of a court of law to pronounce. Nor are we called upon to offer any judicial opinion as to the lawfulness or propriety of what was done in the present case, apart from the validity and legalizing effect of the colonial Act. It is manifest, however, that there may be occasions in which the necessity of the case demands prompt and speedy action for the maintenance of law and order at whatever risk, and where the governor may be compelled, unless he shrinks from the discharge of paramount duty, to exercise de facto powers which the legislature would assuredly have confided to him if the emergency could have been foreseen, trusting that whatever he has honestly done for the safety of the state will be ratified by an Act of indemnity and oblivion. There may not be time to appeal to the legislature for special powers. The governor may have, upon his own responsibility, acting upon the best advice and information he can procure at the moment, to arm loyal subjects, to seize or secure arms, to intercept munitions of war, to cut off communication between the disaffected, to detain suspected persons, and even to meet armed force by armed force in the open field. If he hesitates, the opportunity may be lost of checking the first outbreak of insurrection, whilst by vigorous action the consequences of allowing the insurgents to take the field in force

1870

PHILLIPS v. EYRE.

may be averted. In resorting to strong measures he may have saved life and property out of all proportion to the mistakes he may honestly commit under information which turns out to have been erroneous or treacherous. The very efficiency of his measures may diminish the estimate of the danger with which he had to cope, and the danger once past, every measure he has adopted may be challenged as violent and oppressive, and he and every one who advised him, or acted under his authority, may be called upon, in actions at the suit of individuals dissatisfied with his conduct, to establish the necessity or regularity of every act in detail by evidence which it may be against public policy to disclose. (1) The bare litigation to which he and those who acted under his authority may be exposed, even if defeated by proving the lawfulness of what was done, may be harassing and ruinous. Under these and like circumstances it seems to be plainly within the competence of the legislature, which could have authorized by antecedent legislation the acts done as necessary or proper for preserving the public peace, upon a due consideration of the circumstances to adopt and ratify like acts when done, or, in the language of the law under consideration, to enact that they shall be "made and declared lawful and confirmed." Such is the effect of the Act of Indemnity in question, which follows the example of similar legislation in the mother country and in other dominions and colonies of the Crown.

In England, upon numerous occasions from the fourteenth century downwards, similar laws have been passed after great troubles, with the view of indemnifying those who took arms to maintain the authority of the Crown, and of putting an end to occasions of discord, even by way of general Act of oblivion, prohibiting civil suits and criminal prosecutions in respect of acts done in the course of a rebellion. Amongst these are 1 Edw. 3, stat. 1, c. 1, stat. 2, c. 3; 14 Edw. 3, stat. 1, cc. 2, 3; 5 Rich. 2, stat. 1, c. 5; 21 Rich. 2, c. 14; 7 Hen. 4, c. 18; 1 Hen. 5, c. 6; 1 Hen. 7, c. 6; 12 Car. 2, c. 11 (after the Grand Rebellion); 1 W. & M. stat. 2, c. 8; 2 W. & M. stat. 2, c. 13; 4 & 5 W. & M. c. 19 (after the Revolution); 1 Geo. 1, stat. 2, c. 39 (after the rising of 1715); 19 Geo. 2, cc. 20, 39, s. 18 (after the rising of 1745), reciting as the gist of the matter that it was "reasonable that acts done for

(1) See the recitals of the Indemnity Act, 41 Geo. 3, c. 66.

1870

PHILLIPS v. EYRE.

the public service, though not justifiable by the strict forms of law, should be justified by Act of Parliament." The principle of these enactments is indemnity for what was done in zeal for the public service, and a politic oblivion of the troubles and dissensions of the past, so that, to use the language of the Act of "Grace and General Pardon, Indemnity, and Oblivion" passed at the Restoration, "No mention be made thereof in time to come, in judgment or judicial proceeding." In like manner an Act of Indemnity was passed by the Irish Parliament after the Rebellion of 1798, 39 Geo. 3, c. 3, amended by 39 Geo. 3, c. 50, and further enforced by 40 Geo. 3, c. 89. The earlier Act of the Irish Parliament (3 Geo. 3, c. 19), is an instance, though but slight, of the same kind. And similar legislation appears to have taken place in the colonies—for instance, at the Cape in 1836, 1847, and 1853; in Canada in 1838; in Ceylon in 1848; in St. Vincent in 1862; and in New Zealand in 1865, 1866, and 1867. In 1866 the New Zealand Act was disallowed by the Crown, and all such legislation is subject to the same control.

This series of precedents was acknowledged to exist; but it was contended that they were misleading, and that the colonial Act was, notwithstanding, either altogether unauthorized and futile, or at least unavailing as regarded the defendant, or that, if valid, its operation was restricted to the limits of the island, and ineffectual to bar an action in any other part of Her Majesty's dominions. We proceed to consider these various objections.

Doubts were suggested in this court upon what was taken for granted in the argument and judgment in the court below, namely, the power of the Crown to create a legislative assembly in a settled colony. Assuming, but by no means affirming (1) that, as contended for by counsel for the plaintiff, the colony in question, though originally conquered from the Spaniards, is now to be deemed a settled as distinguished from a conquered or ceded one, we consider these doubts as to the power of the Crown and of the local legislature to be unfounded. There is even greater reason for holding sacred the prerogative of the Crown to constitute a local legislature in the case of a settled colony, where the inhabitants

(1) See the judgment of *Beaumont* v. *Barrett* (1 Moo. P. C. at p. 78), not overruled upon this point. See also 6 St. Tr. 1349; 20 St. Tr. 301.

are entitled to be governed by English law, than in that of a conquered colony, where it is only by grace of the Crown that the privilege of self-government is allowed, though where once allowed it cannot be recalled. In colonies distant from the mother-country to which writs to return members to the imperial parliament do not run, it is essential, both for the due government of the country in dealing with matters best understood upon the spot, and with emergencies which do not admit of delay, and also for giving subjects there resident the benefit of a voice, by their representatives, in the councils by which they are taxed and governed, that the Crown should have the power of creating a local parliament.

Accordingly, it is certain that the Crown has, in numerous instances, granted charters under which houses of assembly and legislative councils have been established for the government of colonies, whether conquered or settled, and that such councils and assemblies have, from time to time, made laws suited to the "emergencies of the colony," which, of course, include all measures necessary for the conservation of peace, order, and allegiance therein. In effect, the inhabitants have been allowed to reserve the power of self-government, through their representatives in the colony, subject to the approval of the Crown and the control of the imperial legislature. *Beckford* v. *Wade* (1), in which the Limitation Act of Jamaica was held to bar the title, and not merely the remedy, is one of many instances in which the force of such legislation has been recognized here. And its lawfulness was taken for granted by Lord Wensleydale, in the leading case of *Kielly* v. *Carson* (2), in a judgment of the weightiest authority delivered after two arguments, the second of which took place before eleven members of the Judicial Committee, comprising, besides Lord Wensleydale himself, Lord Lyndhurst, Lord Brougham, Lord Cottenham, Lord Campbell, Lord Chief Justice Tindal, and Dr. Lushington. In that judgment Lord Wensleydale, after observing that Newfoundland was a settled, not a conquered, colony, added: "To such a colony there is no doubt that the settlers from the mother-country carried with them such portion of its common and statute law as was applicable to their new situation, and also the rights and immunities of British

(1) 17 Ves. 87. (2) 4 Moo. P. C. at p. 84.

1870

PHILLIPS v. EYRE.

subjects. Their descendants have, on the one hand, the same laws and the same rights, unless they have been altered by parliament; and on the other hand, the Crown possesses the same prerogative and the same powers of government that it does over its other subjects; nor has it been disputed in the argument before us, and therefore we consider it as conceded, that the sovereign had not merely the right of appointing such magistrates and establishing such corporations and courts of justice as he might do by the common law at home, but also that of creating a local legislative assembly, with authority subordinate, indeed, to that of parliament, but supreme within the limits of the colony for the government of its inhabitants."

This opinion was reflected upon in the argument, but it is in accordance with just principles of government, with the law laid down by the text-writers, including Mr. Justice Blackstone (1); and it has now been drawn into doubt for the first time. We are satisfied that it is sound law, and that a confirmed act of the local legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the imperial parliament.

The authorities cited for holding void certain Acts of colonial assemblies ordering imprisonment for contempt are inapplicable, being either cases in which there was no legislation, or cases in which the only question was whether the local legislation fulfilled the conditions assumed to be imposed by a governing Act of the Imperial Parliament, and those conditions were held to have been fulfilled.

It was further argued that the Act in question was contrary to the principles of English law, and therefore void. This is a vague expression, and must mean either contrary to some positive law of England, or to some principle of natural justice, the violation of which would induce the Court to decline giving effect even to the law of a foreign sovereign state. In the former point of view, it is clear that the repugnancy to English law which avoids a colonial Act means repugnancy to an imperial statute or order made by authority of such statute applicable to the colony by express words

(1) 1 Bla. Com. 107, 108.

or necessary intendment; and that, so far as such repugnancy extends, and no further, the colonial Act is void. The 28 & 29 Vict. c. 63, s. 2, enacts that, "Any colonial law which is, or shall be, in any respect repugnant to the provisions of any Act of parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." And to remove all doubt, s. 3 of the same Act affirmatively enacts that "No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provision of some such Act of parliament, order, or regulation as aforesaid." To what Act, order, or regulation, then, is the Jamaica Act of Indemnity and oblivion repugnant? It was argued to be repugnant to the Governors Act, 11 & 12 Wm. 3, c. 12, by which any governor who shall be guilty of oppressing any of Her Majesty's subjects within this government or of any other crime or offence, may be tried and punished by indictment before the Court of King's Bench, or a special commission appointed by the Crown; and further remedy is provided in such a case by 42 Geo. 3, c. 85. The argument, therefore, is, that because the imperial legislature has provided that for oppression, crime, or offence of a governor he shall be criminally answerable in this country, therefore it ought to be held incompetent for the local legislature to protect him by an Act of indemnity or oblivion against the civil consequences of excessive zeal, however sincere, or mistaken exertions, however honest, in the suppression of a rebellion. In dealing with this argument, it should be borne in mind that upon an indictment against a governor for conduct alleged to be oppressive and criminal, circumstances, and above all motives, may be taken into account, which would be excluded in deciding the dry question of civil liability; and that the proceedings upon such indictment, as in all other criminal cases, would be subject to the control and restraint of the Crown. Whether the assent of the Crown had, pro tanto, the effect of an amnesty might be a point worth con-

1870

PHILLIPS v. EYRE.

sidering, if necessary. Supposing that it had not, the proper course to test the alleged criminal responsibility is not by civil action, with a suggestion of a possible indictment, but by actual indictment presented if the facts warrant such a proceeding. If that course cannot be successfully resorted to, the objection of its possibility is a phantom; and if it can, the restraint of a civil action cannot affect its success. In this point of view, therefore, the operation of the colonial Acts upon the present action is not "repugnant to the law of England."

Another objection affecting the defendant personally was, that he was a necessary party to the passing of the Act, and, therefore, could take no benefit thereunder. This objection is founded upon a supposed analogy between legislative and judicial proceedings. In the latter, as a rule, the judgment of an interested judge is voidable and liable to be set aside by prohibition, error, or appeal, as the case may be; but it is not absolutely void, and persons acting under the authority of such a judgment before it is set aside by competent authority would not be liable to be treated as trespassers. This was the opinion of the judges acted upon by the House of Lords in *Dimes* v. *Grand Junction Canal Co.* (1); and, in case of necessity, as where all the judges of a court having exclusive jurisdiction over the subject-matter happen to be interested, the objection cannot prevail: (Ibid. and per Lord Cranworth in *Ranger* v. *Great Western Railway Co.* (2)) The supposed analogy between judicial and legislative proceedings is, moreover, imperfect. The governor is no more a party to the colonial Act than the Legislative Council or House of Assembly, or, in legal theory, every inhabitant of the island represented therein. If the objection were just in the case of a governor, then by like reasoning the Crown could derive no benefit from any Act of Parliament; a result alike contrary to experience and reason. The further objection to that section of the colonial Act which empowers the governor for the time being to decide whether any particular act falls within its provisions does not arise. That section (which follows former precedents) does not appear to have been acted upon, and is not founded upon in the plea. Whether it be valid in this country may depend upon the further question, whether it only affects

(1) 3 H. L. C. 759–786.

(2) 5 H. L. C. at p. 88.

procedure and evidence, or authorizes a judgment in rem as to the character of particular acts.

It was further objected, that the colonial law was contrary to natural justice, as being retrospective in its character, and taking away a right of action once vested, and that for this reason, like a foreign law against natural justice, it could have no extra-territorial force. Retrospective laws are, no doubt, primâ facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. "Leges et constitutiones futuris certum est dare formam negotiis non ad facta præterita revocari; nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit." Accordingly, the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature. But to affirm that it is naturally or necessarily unjust to take away a vested right of action by act subsequent, is inconsistent both with the common law of England and the constant practice of legislation. If (for instance from the common law) a mere stranger, acting without authority at the time, takes upon him to do an act of trespass in the name and for the benefit of an absent person, such professed agent becomes liable for his unauthorized act, and a right of action is acquired by the person against whom the wrong was committed; and yet the general rule of the common law, borrowed from the civil law, is that the person in whose name the act was done may, if he thinks fit, afterwards ratify and adopt it. Such ratification has the effect of a prior authority, and the result is, that if the prior authority of the principal would not have justified the act, both the agent and the principal may be sued as trespassers; and that, if such authority would have justified the act—that is, if the principal could lawfully have authorized it beforehand, then the agent is also justified by matter ex post facto, and the vested right of action is extinguished. Nor is the principle applied exclusively to private transactions, in which, if the act be unlawful in itself, ratification does not free the agent from responsibility. It has

1870

PHILLIPS v. EYRE.

been equally applied to the exercise of sovereign authority, whereby the act of the agent, though originally unlawful, becomes by after ratification an act of state, the original right of action is divested, and all civil liability extinguished. A remarkable instance of this occurred in 1841, when Captain Denman, being sent by the Governor of Sierra Leone upon an expedition to the Gallinas to recover two British subjects supposed to be kept in slavery by a native chief, took upon him, quite apart from the specific object of the expedition, and without orders at the time, to liberate 300 slaves, and to destroy very large quantities of merchandize collected in slave-dealing establishments belonging to foreigners, who afterwards brought actions in this country, which actions, as to the goods at least, would, but for the course afterwards taken, have undoubtedly been maintainable. The Queen's government, however, upon receiving the despatches, ratified and confirmed what had been done, and that ratification was rightly held by the Court of Exchequer, upon a trial at bar, to have the effect of exempting Captain Denman from all responsibility. (1) The same law had, in effect, been acted upon by Lord Stowell, in Sir Home Popham's case, as to a blockade established without orders and subsequently ratified: *The Rolla*. (2) The parties in these latter cases were foreigners, but that circumstance only touches the power of the Crown, and does not affect the question under consideration, whether it be against natural justice, which is due to all mankind alike, native or foreign, that a right of action should be divested by subsequent confirmation of competent authority, and it is clear that the common law of England does not so regard it. Turning to legislation, the same principle becomes more manifest, from the multitude of instances in which it has been applied. The statute book of every parliament in this century (beginning with 41 Geo. 3, c. 66, for indemnifying against actions for the arrest of persons suspected of treason) contains an Act or Acts of Indemnity or otherwise retrospective by which numerous rights of action have been swept away. One instance of retrospective legislation obviously just, to render valid the acts of persons who had fallen honestly into error, and by which infinite actions were killed in embryo, may suffice.

(1) 2 Ex. 167. (2) 6 Rob. Adm. 364.

When the result of the judgment, finally affirmed by the House of Lords, in *The Queen* v. *Millis* (1) was to declare null and void numerous marriages celebrated in Ireland by Presbyterian ministers and others not episcopally ordained, one effect of the decision was to disclose, by the new light thrown upon the relations of families previously supposed to be legitimate, a prospect of vast and interminable litigation, springing from a host of vested rights of action of every description. This result was averted (in so far as it was possible without making persons liable to prosecution who were not so liable before) by the Acts 5 & 6 Vict. c. 113, 6 & 7 Vict. c. 39, and 7 & 8 Vict. c. 81, s. 83. By these beneficial and just statutes the past marriages were ratified and confirmed as from the beginning, for it was in terms enacted that they should "be adjudged and taken to have been and to be" of the same force and effect as if canonically had and solemnized. A more general Act was afterwards passed to render valid certain marriages celebrated abroad, upon which doubt had been thrown by the same decision, 12 & 13 Vict. c. 68, s. 20. Indeed, it would fill a long chapter in history to enumerate all the instances of retrospective legislation.

The retrospective Attainder Acts of earlier times, when the principles of law were not so well understood or so closely regarded as in the present day, and which are now looked upon as barbarous and loosely spoken of as ex post facto laws, were of a substantially different character. They did not confirm irregular acts, but voided and punished what had been lawful when done. Mr. Justice Blackstone (2) describes laws ex post facto of this objectionable class as those by which "after an action indifferent in itself is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust." The same distinction was elaborately pointed out in the judgment of the supreme court of the United States, cited as

(1) 10 Cl. & F. 534. (2) 1 Bla. Com. 46.

1870

PHILLIPS v. EYRE.

an authority for the plaintiff. In that case, *Calder* v. *Bull* (1), it was held that an Act of the State of Connecticut passed to set aside a decree of a court of probate and grant a new hearing was valid, though the effect was ultimately to deprive the party in whose favour the first decision was made of the benefit of the decree. The case is chiefly valuable for the opinions expressed by the judges upon the construction of an express prohibition in the Federal constitution, viz., that "No state shall pass any ex post facto law." The opinion of the Supreme Court is summarized in the following passage of the judgment of Chase, J. (2): "Every ex post facto law must necessarily be retrospective; but every retrospective law is not an ex post facto law. The former only are prohibited. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law ex post facto within the prohibition that mollifies the rigour of the criminal law, but only those that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, or to commence at an antecedent time, as to save time from the Statute of Limitations, or to excuse acts which were unlawful and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime." And he adds at page 393: "I admit, an act unlawful in the beginning may, in some cases, become lawful by matter of after fact." Besides this leading case of *Calder* v. *Bull* (1), there are many decisions in the Supreme Court upon the same subject, the result of which is that a state law may be retrospective in its character and may divest vested rights and yet not violate the

(1) 3 Dallas, 386. (2) 3 Dallas, at p. 391.

constitution of the United States, unless it also impairs the obligation of contracts, this being in terms thereby prohibited. *Charles River Bridge* v. *Warren Bridge* (1). The authority of the Supreme Court of the United States, so much relied upon for the plaintiff as illustrating the general principles of law upon which the decision of this question depends, thus turns out upon examination to be so far favourable to the validity of the colonial Act. In fine, allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the state, or even the conduct of individual subjects, the justice of which, prospective laws made for ordinary occasions and the usual exigencies of society for want of prevision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong, summum jus summa injuria. Whether the circumstances of the particular case are such as to call for special and exceptional remedy is a question which must in each case involve matter of policy and discretion fit for debate and decision in the parliament which would have had jurisdiction to deal with the subject-matter by preliminary legislation, and as to which a court of ordinary municipal law is not commissioned to inquire or adjudicate.

As for the authorities referred to in illustration of this objection, *Ogden* v. *Folliott* (2) was the case of an attainder of a royalist by the New Jersey legislation after the declaration and before the recognition of independence, and was decided partly on the ground that New Jersey was not a sovereign state at the time and partly on the ground that the penal laws of one country are not taken notice of in another. *Wolff* v. *Oxholm* (3) was the case of an act of confiscation as prize of a debt by a foreign government, contrary to the law of nations. Another instance might be given of foreign law not regarded elsewhere, viz., revenue laws, relating to the customs which, for some reason not very obvious, have been put out of consideration except in instances where they affect the essential form of contract. These cases are all, for obvious reasons, exceptional.

(1) 11 Peters, 420. (2) 3 T. R. 726.
(3) 6 M. & S. 92.

1870

PHILLIPS v. EYRE.

The last objection to the plea of the colonial Act was of a more technical character; that assuming the colonial Act to be valid in Jamaica and a defence there, it could not have the extra-territorial effect of taking away the right of action in an English court. This objection is founded upon a misconception of the true character of a civil or legal obligation and the corresponding right of action. The obligation is the principal to which a right of action in whatever court is only an accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith. "Quæ accessorium locum obtinent extinguuntur cum principales res peremptæ sunt." A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject-matter may shew that the parties intended their bargain to be governed by some other law; but, primâ facie, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere unless by force of some distinct exceptional legislation, superadding a liability other than and besides that incident to the act itself. In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong.

6 C B 234

Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign causes of action altogether, namely, those which would be local if they arose in England, such as trespass to land: *Doulson* v. *Matthews* (1), and even with respect to those not falling within that description our courts do not undertake universal jurisdiction. As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed

(1) 4 T. R. 503.

1870

PHILLIPS v. EYRE.

in England; therefore, in *The Halley* (1), the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done. Therefore in *Blad's Case* (2), and *Blad* v. *Bamfield* (3), Lord Nottingham held that a seizure in Iceland, authorized by the Danish Government and valid by the law of the place, could not be questioned by civil action in England, although the plaintiff, an Englishman, insisted that the seizure was in violation of a treaty between this country and Denmark—a matter proper for remonstrance, not litigation. And in *Dobree* v. *Napier* (4) Admiral Napier having, when in the service of the Queen of Portugal, captured in Portuguese water an English ship breaking blockade, was held by the Court of Common Pleas to be justified, by the law of Portugal and of nations, though his serving under a foreign prince was contrary to English law, and subjected him to penalties under the Foreign Enlistment Act. And in *Reg.* v. *Lesley* (5), an imprisonment in Chili on board a British ship lawful there, was held by Erle, C.J., and the Court for Crown Cases Reserved, to be no ground for an indictment here, there being no independent law of this country making the act wrongful or criminal. As to foreign laws affecting the liability of parties in respect of bygone transactions, the law is clear that, if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country; but if the foreign law extinguishes the right it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own legislature. This distinction is well illustrated on the one hand by *Huber* v. *Steiner* (6), where the French law of five years' prescription was held by the Court of Common Pleas to be no answer in this country to an action upon a French promissory note,

(1) Law Rep. 2 P. C. 193.
(2) 3 Swan. 603.
(3) 3 Swan. 604.
(4) 2 Bing. N. C. 781.
(5) Bell, C. C. 220; 29 L. J. (M.C.) 97.
(6) 2 Bing. N. C. 202.

1870

PHILLIPS v. EYRE.

because that law dealt only with procedure, and the time and manner of suit (tempus et modum actionis instituendæ), and did not affect to destroy the obligation of the contract (valorem contractus); and on the other hand by *Potter* v. *Brown* (1), where the drawer of a bill at Baltimore upon England was held discharged from his liability for the non-acceptance of the bill here by a certificate in bankruptcy, under the law of the United States of America, the Court of Queen's Bench adopting the general rule laid down by Lord Mansfield in *Ballantine* v. *Golding* (2), and ever since recognized that "what is a discharge of a debt in the country where it is contracted is a discharge of it everywhere." So that where an obligation by contract to pay a debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every court open to the creditor unquestionably falls to the ground. And by strict parity of reasoning, where an obligation, ex delicto, to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided. Cases may possibly arise in which distinct and independent rights or liabilities or defences are created by positive and specific laws of this country in respect of foreign transactions; but there is no such law (unless it be the Governors Act already discussed and disposed of) applicable to the present case.

It may be proper to remark, before quitting this part of the subject, that the colonial Act could not be overruled upon either of these two latter grounds of objection without laying down that no foreign legislation could avail to take away civil liability here in respect of acts done abroad; so that, for instance, if a foreign country after a rebellion or civil war were to pass a general Act of oblivion and indemnity, burying in one grave all legal memory alike of the hostilities, and even the private retaliations which are the sure results of anarchy and violence, it would, if the argument for the plaintiff prevailed, be competent for a municipal court of any other country to condemn and disregard, as naturally unjust or technically ineffectual, the law of a sovereign state, disposing, upon the same constitutional principles as have actuated

(1) 5 East, 124. (2) Cooke's Bankrupt Law, 487.

1870

PHILLIPS v. EYRE.

our own legislature, of matters arising within its territory—a course which to adopt would be an unprecedented and mischievous violation of the comity of nations.

We have thus discussed the validity of the defence upon the only question argued by counsel, touching the effect of the colonial Act, but we are not to be understood as thereby intimating any opinion that the plea might not be sustained upon more general grounds as shewing that the acts complained of were incident to the enforcement of martial law. It is, however, unnecessary to discuss this further question, because we are of opinion with the Court below that the colonial Act of Indemnity, even upon the assumption that the acts complained of were originally actionable, furnishes an answer to the action.

The judgment of the Court of Queen's Bench for the defendant was right, and is affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Shaen & Roscoe.*
Attorneys for defendant: *J. A. Rose.*

MARSHALL, APPELLANT; MURGATROYD, RESPONDENT.

Nov. 9.

Bastardy—7 & 8 Vict. c. 101, *ss.* 2, 3, 75—*Jurisdiction—Child Born on the high Seas.*

According to the rule that a ship on the high seas is part of the territory of the state to which she belongs, a bastard child of which a woman has been delivered on board an English ship is to be deemed born in England, and the mother is entitled to an order of affiliation against the putative father resident in England under 8 & 9 Vict. c. 101.

CASE stated by justices of the West Riding of Yorkshire under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant for that she had, since the passing of 8 & 9 Vict. c. 101, and within twelve calendar months from the date of the application by the respondent, been delivered of a bastard child, of which she alleged the appellant to be the father. On the hearing the justices made an order for the maintenance of the child.

1870

MARSHALL v. MURGATROYD.

The facts proved before the justices were as follows:—

The respondent was delivered of a bastard child on board the ship *Palmyra*, whilst sailing from New York to Liverpool; that ship belonged to the Cunard line of steamers, but neither the respondent nor any witness she called was able to prove whether the *Palmyra* was an English or American vessel. The vessel sailed direct from New York to Liverpool. It was admitted by the appellant's attorney that the Cunard line was an English line of steamers. At the time of the birth of her child the master of the vessel informed the respondent that the ship was in British waters, and, further, that she sailed three days and three nights from and after the birth of the child before the vessel reached Liverpool. But the respondent could give no idea how far the ship was from Liverpool when she was so delivered.

It was contended on the part of the appellant that the ship when respondent was delivered was on the high seas, and at least 600 miles from Liverpool, and that being so, he further contended that the magistrates could not, under the bastardy laws, make an order upon the appellant, inasmuch as the child was born "out of England;" and the appellant cited the case of *Reg.* v. *Blane* (1), which, according to the judgment of Lord Denman, and the other judges, was, that a bastard born out of England could not be affiliated under the provisions of the bastardy laws before magistrates in England. The appellant also contended that the Act under which the information was laid only extended to England and Wales, and that a child could not be affiliated in England if born in Scotland, or out of England and Wales, and he cited the case of *Reg.* v. *Lightfoot* (2) to shew that a summons of bastardy could not be served in Scotland.

The question for the opinion of the Court was, were the magistrates justified under the preceding circumstances in making an order upon the appellant in the face of the objections taken by the appellant that the child was born on the high seas and therefore out of England?

Waddy, for the appellant. The first question is, whether the

(1) 13 Q. B. 769; 18 L. J. (M.C.) 216.

(2) 6 E. & B. 822; 25 L. J. (M.C.) 115.

evidence set out is sufficient to prove that the vessel on board of which the child was born is an English ship.

[BLACKBURN, J. I think we must take it that she was an English ship.]

Assuming, then, that the ship was an English ship, and sailing on the high seas when the child was born, the order is bad. By 7 & 8 Vict. c. 101, ss. 2 and 3, the mother of a bastard child may apply to a justice of the peace, acting for the petty sessional division for the county, or city, borough, or place in which she may reside, for a summons to be served on the man alleged to be the father of such child; and on proof of service of the summons the justices at petty sessions may make an order on the putative father for maintenance. But s. 75 limits the operation of that statute to England and Wales. The child having been born on the high seas was born out of England and Wales. The statute, therefore, does not apply. In *Reg.* v. *Blane* (1), Lord Denman, C.J., says, "We are all clear in the general view of the statutes applying to the maintenance of bastards, that children born out of this country, and especially of foreign mothers, are not the subjects of their provisions." *Reg.* v. *Lightfoot* (2) also seems to shew that the Act only applies to England.

The respondent did not appear.

BLACKBURN, J. Our judgment must be for the respondent. It has been argued that the provisions of 7 & 8 Vict. c. 101, under which this order is made, extend only to England and Wales, that the child of which the respondent was delivered having been born on the high seas was born out of England, and that therefore the order is invalid. I think that the evidence set out in the case is sufficient to shew that the Cunard steamer is an English ship. It is part of the common law and of the law of nations, that a ship on the high seas is a part of the territory of that state to which she belongs; and therefore an English ship is deemed to be part of England. The child having been born on board an Eng-

(1) 13 Q. B. 769; 18 L. J. (M.C.) 216.

(2) 6 E. & B. 822; 25 L. J. (M.C.) 115.

1870

MARSHALL v. MURGATROYD.

lish ship, the statute applies. The justices were therefore right in making the order.

LUSH, J., concurred. (1)

Judgment for the respondent.

Attorney for appellant: *H. B. Clarke.*

Nov. 21.

SMITH, APPELLANT; BARNETT, RESPONDENT.

Exemption from Toll—Turnpike—"Usual Place of Religious Worship"—3 Geo. 4, c. 126, s. 32.

By s. 32 of 3 Geo. 4, c. 126, persons "going to or returning from their usual place of religious worship" are exempted from toll at turnpikes.

A minister of the Primitive Methodists had assigned to him, by persons having authority amongst the Primitive Methodists, the Sunday and other services in a district comprising thirteen parishes, of which the parish of F. was one. The days on which and the places at which he was to attend were fixed at regular quarterly meetings of the Primitive Methodists, and were printed on a "plan." The minister, according to this plan, had to preach at F. on three Sundays in one quarter of a year, and on the other Sundays during the quarter at some of the other parishes in his district:—

Held, that in going to F. on the Sundays indicated in the plan to conduct the services there, the minister was going to "his usual place of religious worship," and was therefore exempt from liability to pay tolls.

CASE stated by justices of Gloucestershire under 20 & 21 Vict. c. 43.

The appellant was a nonconformist minister of the Primitive Methodist Connexion. He and other ministers and preachers have assigned to them, by the persons having authority in their connexion, the Sunday and week-day services and duties in a district comprising thirteen parishes, of which the parish of Filkins, in the county of Oxford, is one. A printed "plan," shewing the days on and places in the district at which such ministers and preachers are respectively to attend, is prepared by the quarterly meeting of the connexion, and such ministers and

(1) This case was decided by the Court sitting in the second division of the Court of Queen's Bench, under the Judges Jurisdiction Act, 1870 (33 Vict. c. 6.) ss. 2, 4.

preachers are by the rules of the connexion obliged to obey the directions contained in the plan. The appellant had, under the plan in force in March last, to preach at Filkins on three Sundays during the quarter of a year mentioned therein, ending 17th of April last, and on other Sundays during the quarter it was his duty to preach in four other parishes in the district.

On Sunday the 6th of March last the appellant had to preach and conduct the services at the chapel of the connexion at Filkins. To reach this parish from his place of abode he had to pass through the turnpike gate at Lechlade, in the county of Gloucester, at which the respondent, who was then collector, demanded of the appellant payment of toll in respect of the horse and trap which he was using. The appellant claimed exemption under 3 Geo. 4, c. 126, s. 32. The respondent insisted on being paid the toll, and the appellant thereupon paid it.

Upon an information under s. 32 of 3 Geo. 4, c. 126, against the respondent for unlawfully demanding and taking this toll, the justices made an order dismissing the complaint.

The question for the opinion of the Court was, whether the appellant was entitled, under s. 32 of 3 Geo. 4, c. 126 (1), to exemption from toll at the Lechdale turnpike in going to and returning from Filkins on the Sunday in question.

Pinder (*Greville Howard* with him) for the appellant. The question is, whether the appellant was going to his "usual place of religious worship" within the meaning of s. 32 of 3 Geo. 4, c. 126. Although the appellant did not always go to the same place of religious worship, he may be properly said to have been going to his "usual place" of worship on the Sunday in question, because it was his duty to go there under the "plan." A decision that the appellant was not going to his "usual place" of worship would be equivalent to a decision that he has no such place, although he goes regularly to fixed places of worship, according

(1) 3 Geo. 4, c. 126, s. 32, enacts that "no toll shall be demanded or taken . . . on any turnpike road . . . of or from any person or persons going to or returning from his, her, or their proper parochial church or chapel, or of or from any other person or persons going to or returning from his, her, or their usual place of religious worship, tolerated by law, on Sundays or on any day on which Divine service is by authority ordered to be celebrated . . .

1870

SMITH v. BARNETT.

to a uniform usage in the religious body to which he belongs. There is no decision upon this point. In *Lewis* v. *Hammond* (1), it was held that a dissenter going to his proper place of religious worship situate out of the parish in which he resided was not "going to his proper parochial church, chapel, or other place of religious worship" within the meaning of a statute of 37 Geo. 3 (2), as the word "parochial" governed the whole sentence. In 3 Geo. 4, c. 126, s. 32, the words "usual place of religious worship" have been added to those of the former Act, and these words seem to meet the present case. In the Justice of the Peace, vol. xii. p. 95, there is an opinion of Sir Fitzroy Kelly on this section, in which he says: "The exemption in the Act is not confined to persons attending one place of worship, but extends to all persons going to all places of religious worship to which they usually resort, according to the customary forms of their religion, and consequently the itinerant and local preachers above mentioned are entitled to exemption." There is also an opinion by Sir N. Tindal, and another of Mr. R. Mathews, to the same effect. It is reasonable that an exemption of this sort should receive a liberal construction.

No counsel appeared for the respondent.

BLACKBURN, J. The question is, what is "the usual place of religious worship" of the appellant, and whether the church at Filkins can be called his usual place of religious worship. I agree with the opinion of Sir N. Tindal, referred to by Mr. Pinder, "that if the minister attends the chapel according to the usage prescribed and observed by the rules of the particular persuasion to which he belongs, I think such chapel may be considered as to him the usual place of religious worship when he is attending it on the day so prescribed." I think, therefore, that the appellant was entitled to exemption from toll.

MELLOR, J. I am of the same opinion. The section probably would not apply to a case of caprice, where a person went to different places of worship as a mere matter of choice. When, however, a minister, in pursuance of the directions of his superior

(1) 2 B. & Ald. 206.

(2) This Act is not in the printed collection of statutes.

spiritual authority, has to preach sometimes at one place and sometimes at another in a fixed order, and at fixed times, I think that each of such places is his "usual place of religious worship."

1870

SMITH v. BARNETT.

Judgment for the appellant.

Attorneys for appellant: *Price, Bolton, & Filder, Lincoln's Inn, for Jones & Forrester, Malmesbury.*

STEBBING *v.* THE METROPOLITAN BOARD OF WORKS.

Nov. 11.

Compensation for Land taken under Compulsory Powers of Statute—Mode of Assessing Value to Owner of Land, with Restrictive Rights—Churchyard.

When land subject to restrictions as to its use is taken for a public object under compulsory powers conferred by statute, the amount of compensation to the person interested therein is to be assessed with reference to the value of his interest therein, and not with reference to its value to the persons taking it.

The plaintiff was rector of three parishes in the city of L., in the churchyards of which burials were prohibited by order in council; the defendants were empowered by statute to take compulsorily, upon making compensation, the whole of one and part of the other two churchyards. The land so taken was to be used partly in forming a new street, and partly for the erection of buildings:—

Held, that the plaintiff was entitled to compensation only for the loss that he had sustained by being deprived of his interest in the churchyards, and not according to the value of which the land would be to the defendants after they had acquired it.

SPECIAL case without pleadings.

1. The plaintiff is the rector of the three several parishes of St. Nicholas Olave, St. Nicholas Cole Abbey, and St. Mary Mounthaw, all in the city of London.

2. The defendants were incorporated by 18 & 19 Vict. c. 120.

3. By the Metropolis Improvement Act, 1863 (26 & 27 Vict. c. 45), which is to be taken as part of this case, and with which the Lands Clauses Consolidation Act, 1845, is incorporated, the board was authorized to make a new street from Blackfriars to the Mansion House in the city of London, and for that purpose was empowered to enter upon and take and use certain lands defined in the deposited plans and book of reference thereto mentioned in the Act.

4. In each of the three several parishes of which the plaintiff is

1870

STEBBING v. METROPOLITAN BOARD OF WORKS.

rector is an ancient burial or grave yard. For many years, and until the burial of the dead within the metropolis was prohibited by the Act forbidding intramural interments in 1852, these graveyards had been used as the graveyards and burial-grounds of the parishes in which they were respectively situate, and numerous interments had taken place therein.

5. Each of the three graveyards fell within the limits of deviation of the new street authorized by the Act of 1863, and the same, as taken by the board in manner hereinafter mentioned, were included in and defined by the deposited plans.

6. The board requiring to take the graveyard of the parish of St. Mary Mounthaw, and a portion of the graveyards of St. Nicholas Olave and St. Nicholas Cole Abbey, for the purposes of the new street, gave to the rector notice thereof according to the provisions of the Lands Clauses Consolidation Act in that behalf, and that they were willing to treat and agree as to the purchase-money and compensation to be paid by them for such lands.

7. No agreement having been come to, the board put into execution the powers contained in the Lands Clauses Consolidation Act, 1845, and entered upon and took possession of the graveyards or burial-grounds so required by them, first paying into the Bank of England the amount of purchase-money and compensation for such land as determined by a valuer appointed under the provisions of s. 85 of that Act, and otherwise complying with the statute.

8. The lands included in the notices and possession which the board took, were all lands which were part of, and had been consecrated to, and were held for the purposes of the parish graveyard or burial-grounds of the three parishes, and contained numerous graves and coffins, together with the remains of many deceased persons who had been formerly buried in the churchyards.

9. Upon obtaining possession of the graveyards, the board proceeded to fence them off from the residue of such graveyards, and then applied to the Bishop of London, within whose diocese the parishes are situate, for his faculty to disturb and remove the graves and human remains from the lands taken by the board.

10. The bishop, on the 10th of February, 1868, granted his faculty subject to the observance of certain conditions therein appearing.

11. The board have complied with the terms imposed by the

faculty, and have accordingly removed and re-interred all the human remains; they have filled up the soil, and have laid the greater part of the lands so taken by them from the graveyards into the site of the new street; the residue of the lands so taken are in the possession of the board, forming part of the frontage of the new street, and are available, and intended to be used, for building sites.

12. In the case of St. Nicholas Cole Abbey the whole of the land so taken forms part of the new street. In the case of St. Mary Mounthaw the whole of the land so taken, with a very small exception, also forms part of the new street. But in the case of St. Nicholas Olave about one half of the land so taken is available, and is intended to be used for building sites; the residue forms part of the new street.

14. On the 22nd of February, 1869, the parties duly executed an agreement whereby it was provided that the question of the purchase-money and compensation to be made or paid by the board should be left to the decision of an arbitrator in the manner by the agreement provided.

14. At the hearing of the case before the arbitrator, on the part of the rector it was contended that inasmuch as the lands were taken and used by the board for secular purposes, and were in fact divested of their ecclesiastical character, the arbitrator was bound to ascertain the value of the lands as if such lands had been and were divested of their ecclesiastical character and applicable to any purpose to which their owner might apply them; but it was conceded that all proper deduction ought to be made for the costs of obtaining and complying with the conditions of the faculty for removing the human remains, and all expenses of, and incidental to, such removal.

15. On the part of the board it was contended, that the lands being consecrated and devoted to the purposes of parish burial-grounds, their value must be ascertained as such, and that as they were only secularized by the Act empowering the board to purchase them, that Act could confer no additional value to the lands in the hands of those from whom the board took them.

And secondly, it was urged on behalf of the board, that as in all probability the bishop would only grant a faculty to remove

1870

STEBBING v. METROPOLITAN BOARD OF WORKS.

the human remains if the land was to be used for a public improvement (the erection of a schoolhouse or some analogous purpose), and would refuse it if the land was to be applied to any ordinary commercial or building purpose, its value ought to be ascertained having regard thereto, and to the fact that without the faculty the lands would be practically useless.

16. It was agreed before the arbitrator that he should make his award for such sum as he might find to be due to the plaintiff upon the principle contended for on his behalf; but that the question of what is the proper principle to be adopted in valuing the lands should be raised for the opinion of the Court in a special case.

The question for the opinion of the Court was, whether any and which of the aforesaid principles is that which it is correct to adopt in determining the amount of the purchase-money and compensation, and if not, to state the correct principle.

Manisty, Q.C. (*Bidder* with him), for the plaintiff, contended that the correct principle upon which the compensation to the plaintiff was to be assessed and paid was to treat the lands in question as secular lands, but deducting from their value the necessary expenses of the removal and re-interment of the human remains; that on the service of the notice to treat the lands became secularized, and the defendants having converted them to secular purposes could not be admitted to contend that the lands are to be valued as other than secular lands. He relied on *Hilcoat* v. *Archbishops of Canterbury and York*. (1)

[HANNEN, J. Suppose that a person is entitled to the fee simple of land over which the public have a right of recreation or of way, and that this land is taken compulsorily, as the public can receive no compensation, will he be entitled to receive as compensation the value of the land freed from the right of the public?]

Sir J. B. Karslake, Q.C. (*Philbrick* with him), for the defendants, contended that the plaintiff was only entitled to be compensated for the value of his interest in the lands at the time the defendants purchased them; and as at that time the plaintiff could only apply the lands to ecclesiastical purposes, they were to be valued as lands set apart for that purpose; and that the plaintiff ought not to be

(1) 10 C. B. 327; 19 L. J. (C.P.) 376.

compensated according to the value which the lands might acquire by being put to secular purposes by the defendants after they had acquired them.

Manisty, Q.C., was heard in reply.

COCKBURN, C.J. In this case our judgment must be for the defendants. The plaintiff is the rector of three parishes in each of which there is a churchyard which has been closed under statutory authority, and the defendants, the Metropolitan Board of Works, have acquired by statute power to take these churchyards; but the plaintiff, as the owner of the soil of the churchyards, claims compensation under the Lands Clauses Act, in respect of his interest. What is the effect of the enactment as to compensation for taking land under a compulsory power? It is not a question to be solved simply with reference to the amount of interest which the owner may have, that is to say, the degree of estate which he may have. It is not to be solved by determining whether he is a freeholder or a leaseholder. The nature of the estate is one of the elements, undoubtedly, upon which the compensation for land compulsorily taken must be assessed; but there is another and equally important element to be taken into account; and that is, when the degree of his interest shall have been ascertained, the value to him of the land in which that interest exists. It never could have been intended that, because a person has a freehold interest, he shall be compensated in respect of that freehold interest in the land taken from him, without reference to the character of the land. It cannot be said that, because a man has a freehold interest in a piece of waste land, he is to receive the same amount of compensation as if he were owner of an equal extent of rich alluvial soil. Owing to the nature of this land, the rector never could have alienated it. He might, perhaps, have obtained an Act of Parliament for converting part of it to some purpose of a quasi secular character; but he would never have been allowed to use it in any way for any secular purpose, with a view to his own interests. It was, therefore, in his hands practically valueless. When the Metropolitan Board of Works are enabled to acquire it for a public purpose, why should he be benefited? He can have no claim to have a new value attached to that which was before valueless, merely

1870

STEBBING v. METROPOLITAN BOARD OF WORKS.

because the legislature has said it shall be transferred from one public purpose to another. There is nothing to be found in the Act to support the plaintiff's contention, nor is it founded on reason. It is argued for the plaintiff, that although in his hands the churchyards are valueless, yet when they pass to the defendants, under the compulsory powers of the Act of Parliament, they acquire a value from the fact that they may be applied to secular purposes. I do not think that is the test applicable to the present case. When Parliament gives compulsory powers, and provides that compensation shall be made to the person from whom property is taken, for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss; and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it. The plaintiff, as rector, could never have parted with those churchyards, and therefore, to him, they were perfectly valueless. The Metropolitan Board, it is true, will be able to apply the land to purposes which will give it an increased value, but that is no loss to the rector. He has lost nothing by the land having been taken, although they may have acquired something which may prove a gain. I can quite understand that if a railway or other commercial company had been about to acquire these churchyards, and it had been suggested to the legislature that their site would be more valuable to the company than to the person called upon to give it up, it might be said that the company ought to pay the increased value which the land would acquire from the purpose to which it was about to be applied, and that they ought in respect of that increased value to make some compensation which might be devoted to some other public purpose. But if the facts of this case had been brought before the legislature, I cannot suppose they would have considered that principle applicable to it. They would have considered that it was only a transfer of the land from one public purpose to another. There can be no reason why the party, in whose hands it was valueless, should be compensated in respect of a supposed loss of a value which, in point of fact, never existed.

The case, I think, is well illustrated by the instance suggested by my Brother Hannen. Suppose that a right of way exists over land, which prevents it from being built upon, and that a public

1870

STEBBING v. METROPOLITAN BOARD OF WORKS.

body has powers conferred by statute to apply that land to some purpose inconsistent with the right of way, could the owner of the property be admitted to allege that, although he could not apply the land to a profitable purpose, and although he lost nothing by being deprived of it, yet as it would be of some value in the hands of the public body, he was to receive compensation in respect of that value? the answer would be, that as compensation is to be given for the loss which has been sustained, he would be entitled to none because he had suffered no loss. I think the same principle is applicable here.

We were pressed with *Hilcoat* v. *Archbishops of Canterbury and York*. (1) I do not pronounce any opinion on that case. But I confess it does not satisfy my mind that its principle ought to be applied to any other case not precisely similar in its circumstances. If we were dealing with the same Act of Parliament that case would be binding on us as an authority, but we are dealing with Acts of Parliament of a different character. Not being convinced that the reasoning in that case is applicable to this, I think the rector, having an interest in the land of no value to him, is not entitled to be compensated according to the value which the land may have when transferred to the board. I think, therefore, judgment must be for the defendants.

MELLOR, J. I am of the same opinion. I think *Hilcoat* v. *Archbishops of Canterbury and York* (1) distinguishable from the present case: its circumstances were very peculiar. I consider myself at liberty to act independently of that case. The land in question is devoted by consecration to spiritual purposes. It is subject to this disability, and no profit could be derived from it, since it was appropriated as a burying-ground. The rector, so long as the churchyard was open, had a right to fees upon the burial of persons in it: when interments in this land were forbidden by the order in council, the rector undoubtedly lost that right, and since that order in council there appear to have been no fees except those payable when, by authority of the secretary of state, burials were allowed to take place; in which case he was still entitled to the accustomed fee; but the land is valuable to him only by

(1) 10 C. B. 327; 19 L. J. (C.P.) 376.

1870

STEBBING v. METROPOLITAN BOARD OF WORKS.

reason of these occasional fees. The object of the Act of Parliament, under which the churchyards have been taken, was not to improve or increase the value of burial-grounds in the hands of incumbents; nor is there any intention to set free burial-grounds which have been stopped up from the restrictions attached to the use of them by reason of their ecclesiastical character; the only change which has been made with respect to these burial-grounds is, that for a public object, namely, making a new street in a part of the City, where a new street was essential for the enjoyment, comfort, and health of the inhabitants, the legislature have given the defendants the power to take a portion of the burial-grounds. Then, upon what principle is the compensation to be assessed? I take it that compensation is to be given only for the loss which a person sustains. And when the legislature, simply for the benefit of the public, not for the benefit of the plaintiff, have given permission to the defendants to take this land, can it be said that the plaintiff is entitled to receive compensation, as if the burial-grounds had been, at the time and before the defendants gave notice to treat, land free from restrictions? Whereas, at that time they were subject to all the restrictions which their ecclesiastical character imposed. If the land had been secularised at the time the defendants took it, I should have thought that the principle proposed by the arbitrator was right; but as the burial-ground was secularised only for the benefit of the public, and not for the benefit of any private person, that principle cannot be applied, and the arbitrator ought to have assessed the value upon the principle of compensating the rector for any pecuniary damage which he may have sustained from having this land detached from his benefice. I see no ground for giving to the rector any other compensation. I think that the arbitrator was wrong in making the assessment contained in his award.

LUSH, J. I am of the same opinion. There is an essential distinction between *Hilcoat* v. *Archbishops of Canterbury and York* (1) and the present case. In that case the question before the Court was, whether the judge who tried the cause had misdirected the jury. He directed the jury that they were not bound

(1) 10 C. B. 327; 19 L. J. (C.P.) 376.

to estimate the value of the ground and buildings for which the plaintiff was entitled to be paid as land irrevocably appropriated to spiritual purposes, of which the plaintiff could make no pecuniary advantage; but that it was competent for them to form their estimate of the value with reference to all the circumstances that appeared in evidence before them. That was the direction to the jury which was objected to; and it was contended that the learned judge ought to have told them that they were bound to consider the land as land irrevocably appropriated to spiritual purposes, and therefore worth nothing. In substance, that direction was: Ascertain what is the value, actual or potential, of this land to the plaintiff. The Court held that the direction was right. The jury were therefore directed to take into account all the circumstances, the possibility, or perhaps probability, of the plaintiff in that case being able to make some profit of it hereafter; but if not, then its value, actual or potential. In the present case the arbitrator, by arrangement between the parties, for the purpose of raising the question, has assessed the value of the land at what it would be if the land were divested of its ecclesiastical character, and as if it were applicable to any purpose to which the owner might apply it. That is a very different question from that raised in *Hilcoat* v. *Archbishops of Canterbury and York* (1). I agree that the land in the hands of the present holder, the rector, is of no practical value—no appreciable value whatever. He can never make it of any value.

What then is the principle upon which the assessment is to be made under the Lands Clauses Act? The compensation, whether it is to be paid between the owner and a railway company, or the owner and the present defendants, is to be awarded under that Act, on the same principle. I think it is clear from the language of the Act that the value of the land is to be assessed on the principle of compensation to the owner. The question is not what the persons who take the land will gain by taking it, but what the person from whom it is taken will lose by having it taken from him. It is contended that this land was secularised by the Act of parliament, and being secularised, is therefore free from all restrictions in the hands of the rector. But that is not so; it

(1) 10 C. B. 327; 19 L. J. (C.P.) 376.

1870

STEBBING v. METROPOLITAN BOARD OF WORKS.

was secularised not for his interest or his benefit, but secularised solely for the benefit of the defendants, and in order that it might be converted to the public purpose to which it has been applied. If they had not taken it, it would have remained as it was. The Act did not intend to put the owner of the land in a better position than he would have been in if the land had not been taken from him. What the legislature intended to give is full compensation and indemnity to the persons from whom land is taken for the loss of the land. I think, therefore, the principle upon which this assessment was made is erroneous.

HANNEN, J. I am of the same opinion. I think we are not bound by the authority of *Hilcoat* v. *Archbishops of Canterbury and York* (1), for the reasons which have been already given. The rector was undoubtedly owner of the freehold of these churchyards, but he was the owner of it subject to a restriction, which it was not practically possible for him to remove, and while that restriction lasted it rendered the value of the freehold little or nothing. The Metropolitan Board are empowered by Act of parliament to purchase the various interests of owners of property, and to make compensation to them for that of which they deprive them. Accordingly, they have to make compensation to the rector for the freehold, subject to this particular restriction, which diminishes its value in his hands. I think that the fact that they purchased for the purpose of devoting the land to another public purpose makes no difference in the principle of compensation. When the Metropolitan Board have purchased the churchyards, the land will be free in their hands from the restriction to which it was subject in the hands of the rector, but that does not increase the value of that which the rector had to sell; it only increases the value of the thing bought when the Metropolitan Board possess it. The rector is not entitled to put that as a ground for increasing the amount which he is to receive. For these reasons I agree that judgment must be for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *Lee & Bolton.*
Attorney for defendants: *W. W. Smith.*

(1) 10 C. B. 327; 19 L. J. (C.P.) 376.

[IN THE EXCHEQUER CHAMBER.]

1870
Nov. 29.

DIGNAM *v.* BAILY.

Error—Pleading—Demurrer and Issue in fact on the same Pleadings—Plaintiff succeeding on Demurrer, but Defendant on Issue shewing a Defence to whole Action, Defendant is entitled to Judgment.

Post 172

Declaration that plaintiff obtained judgment and issued execution against B., and defendant as sheriff arrested B., but allowed him to escape. Pleas: 1. Not guilty. 2. That B. produced to defendant's officer the certificate of the registration of a deed between B. and his creditors, within the meaning of s. 198 of the Bankruptcy Act, 1861, whereupon the officer discharged B., in pursuance of the statute. Issue joined on the pleas; demurrer to the second plea; and replication that plaintiff's cause of action against B., in respect of which judgment was recovered, first accrued after the making and registration of the deed, and plaintiff was not one of the creditors bound by the deed. Issue joined on the replication and demurrer. Judgment on the demurrers, that the second plea is bad in substance, and the replication good. Verdict afterwards found for plaintiff on not guilty, the jury assessing the damages at 23*l.*; and for the defendant on the other issues. Judgment that plaintiff take nothing by his writ, and the defendant go without day and that defendant do recover the excess of his costs over those of plaintiff. Error having been brought on this record:—

Held, by the whole Court, that defendant was entitled on the whole record to the judgment.

By Kelly, C.B., Martin, B., and Brett, J., that the judgment on the demurrers to the second plea and replication ought to be for the defendant; but that the replication, even if it were good in law, not having been sustained in fact, the defendant was entitled on the whole record to judgment.

By Channell and Cleasby, BB., Keating and Montague Smith, JJ., that judgment on the demurrers ought to be for the defendant on the second plea, and for the plaintiff on the replication; and that the issue on the replication having been found for the defendant, he was entitled to judgment.

Declaration, of the 16th of January, 1867, that plaintiff, on the 11th of December, 1866, recovered judgment in the Queen's Bench against Thomas Brassington for 23*l.* 17*s.* 9*d.*; and thereupon plaintiff, on the 14th of December, 1866, sued out a ca. sa. and delivered the writ to defendant, being the sheriff of Kent, and defendant took Brassington, and without any legal cause suffered him to escape, &c.

Pleas: 1. Not guilty; 2. That after defendant had taken him Brassington produced to defendant's officer and gave him a copy of the certificate under the seal of the Court of Bankruptcy of the

1870

DIGNAM v. BAILY.

due registration of a deed made and executed between Brassington and his creditors within the true intent and meaning of s. 198 of the Bankruptcy Act, 1861, and other statutes in that behalf; wherefore defendant thereupon released Brassington, in pursuance of the provisions of the said statutes.

Replications: 1. Plaintiff joins issue on the defendant's pleas; 2. As to the second plea, that plaintiff's cause of action against Brassington, in respect of which the judgment was recovered, first accrued to plaintiff after the making and after the registration of the said deed, and plaintiff was not a creditor of Brassington in respect of the said cause of action when the deed was made, nor when the same was produced and left for registration, nor until after the certificate was granted, and plaintiff was not amongst the creditors referred to or intended to be bound by the deed; 3. Demurrer to the second plea.

Rejoinder: Taking issue on the second replication to the second plea, and joining in demurrer; and demurrer to the second replication.

Joinder in demurrer.

The record then proceeded as follows:—

"Afterwards, on the 17th of January, 1868, come here the parties, &c., and it appears to the Court that defendant's second plea is bad in substance, and plaintiff's second replication good; but let judgment be stayed until the trial of the issues to be tried by the country, and let a jury, &c., as well to try the issues in fact and to assess the damages in respect of the premises whereof the parties have put themselves upon the Court." Afterwards, on the 14th of May, 1868, &c., and the jury find the first issue, i.e., on the plea of not guilty, for the plaintiff, and they assess the damages of the plaintiff on occasion of the premises within complained of by him, whereof the parties put themselves upon the judgment of the Court over and above his costs of suit to 23*l.* 17*s.* 9*d.*, and for those costs of suit to 40*s.*; (1) and they find the other issues for defendant."

Judgment signed on the 22nd of May, 1869. "Therefore it is

(1) This assessment of damages was added to the record (on the 24th of November, 1870) after the argument in the Exchequer Chamber, by order of a master in pursuance of the suggestion of that Court.

considered that plaintiff take nothing by his writ, and that defendant go without day, &c.; and because the costs of suit of defendant as to the issues joined (except the first issue) and so found for the defendant by the verdict, exceed plaintiff's costs of the issues upon which the parties had put themselves upon the judgment of the Court by 50*l.*, therefore it is considered that defendant do recover against plaintiff 50*l.* for his costs."

On this record error was brought by the plaintiff.

The plaintiff's points were:—

1. That plaintiff is entitled to judgment for 23*l.* 17*s.* 9*d.*, the damages found by the jury upon the first issue, and costs. 2. That the finding of the jury in favour of defendant upon plaintiff's second replication to the second plea cannot affect plaintiff's right to judgment found upon the finding for plaintiff upon the first issue, and upon the judgment of the Court in favour of plaintiff upon the demurrer to the second plea. 3. That the finding of the jury for defendant upon plaintiff's second replication to defendant's second plea cannot be called in aid to make good defendant's second plea. 4. That the proper judgment is a judgment for plaintiff upon the first and second issues joined for 23*l.* 17*s.* 9*d.*, and for the costs as to those issues; and for defendant as to the issue joined upon the second replication to the second plea, and for defendant's costs as to those issues.

The defendant's points were:—

That upon the whole record defendant is entitled to judgment; 1. Because the record shews that plaintiff was bound by the deed mentioned in the second plea, and that therefore there was, and is, a defence to the action. 2. Because each and every series of the pleadings on the record is to be dealt with and considered as if it were the only series of pleadings on the record; and if any of the series of pleadings discloses a defence to the action, defendant is entitled to the general verdict and judgment, whatever may be the result of any or all of the other series of pleadings on the record. 3. Because the series of pleadings of which the demurrer to the second plea formed part, was and is wholly distinct from the series of pleadings of which the replication to the second plea formed part,—the same as if they were on separate records. And this latter series of pleadings must be dealt with as if there had

BIBL. LONDIN UNIV.

1870

DIGNAM v. BAILY.

been no demurrer, and it were the only series of pleadings on the record. 4. That dealing with the series of pleadings, including the second replication to the second plea and the issue on that replication, as if it were the only series on the record, the faults in the second plea are aided by pleading over, viz., by the averments in the second replication and the issue thereon. 5. That the faults in the second plea are aided by the verdict on the issue raised on the second replication, which verdict, when expressed in full, finds that plaintiff was amongst the creditors referred to and intended to be bound by the deed. 6. That supposing there had been no pleadings, but the facts appearing on the record as found by the verdict, had been stated in a special case, they would have entitled defendant to judgment; and where on the whole record the right appears to be with either party, the Court are bound to give judgment in favour of such party.

The proceeding was in effect an appeal from the decision of the Queen's Bench ordering the postea to be delivered to the defendant (1).

June 18. *Mellish, Q.C.*, for the plaintiff.

Raymond, for the defendant.

They urged respectively the above points; the arguments and cases cited being the same as in the Queen's Bench (1).

Nov. 29. The judgment of Kelly, C.B., Martin, B., and Brett, J., was delivered by

KELLY, C.B. In this case we are called upon, after a decision for the plaintiff upon demurrers to a plea and a replication going to the whole cause of action, and a decision for the defendant upon issues in fact also involving the whole cause of action, to pronounce our judgment upon the whole record.

Upon the facts and the merits of the case we are of opinion that our judgment ought to be for the defendant.

The plaintiff claims damages against the sheriff for an escape; the sheriff's officer having discharged one Brassington, when taken in execution upon a judgment obtained against him by the plaintiff on the 11th of December, 1866, upon the production to him by Brassington of a certificate of the due registration of a composition

(1) See Law Rep. 5 Q. B. 53.

deed between Brassington and his creditors, within the meaning of s. 198 of the Bankruptcy Act, 1861. The judgment was signed on the 11th of December, subsequent to the date of the certificate of registration, which bore date immediately after the 20th of June, on which day the deed of composition under s. 198 was executed. But the debt recovered by the judgment was upon a bill of exchange, which, (though not due until the 20th of July, a month after the deed of composition,) was drawn and accepted by Brassington on the 17th of April, and consequently was barred by the composition deed. Brassington was therefore entitled to his discharge; and the plaintiff has no right of action against the sheriff for an escape.

These being the facts (1), if they had appeared before us upon a special case without pleadings, the defendant would have been entitled to our judgment. We must, however, now look to the record.

The plaintiff declares upon the escape.

The defendant pleads, first, not guilty. Upon this there is a verdict and judgment for the plaintiff; and by an amendment made on the 24th of this month of November, there is an entry of damages to the amount of 23*l.* 17*s.* 9*d.*, and costs 40*s.*

The defendant pleads, secondly, the production to the sheriff's officer of a certificate of the due registration of a composition deed between Brassington and his creditors, within the true intent and meaning of s. 198 of the Bankrupt Act, 1861. To this the plaintiff replies, that the cause of action in respect of which he had recovered judgment against Brassington first accrued to him after the making and after the registration of the deed of composition. And to this second plea, and also to this replication, there are demurrers. And the plaintiff likewise takes issue on the plea, and the defendant on the replication.

The Court of Queen's Bench have given judgment for the plaintiff upon the demurrers, thus holding the replication good (2). While, on the other hand, upon the issues to the country upon the plea and upon the replication, the verdict and judgment have been given for the defendant.

(1) These facts appear from the report of the case when before the Court of Queen's Bench on the rule to enter the verdict for the defendant: Law Rep. 4 Q. B. 376.

(2) Law Rep. 3 Q. B. 178.

1870

DIGNAM v. BAILY.

It is necessary, therefore, the defendant having succeeded upon all the issues in fact, with the exception of the first issue of not guilty, to consider the effect of the judgment upon demurrer to the replication in favour of the plaintiff. It may be that the plea is defective, inasmuch as it does not distinctly allege that the debt in respect of which the judgment had been obtained was barred by the composition deed. But this defect, if it be one, is cured by the replication and rejoinder taking issue on it, for the replication, alleging that the plaintiff's cause of action against Brassington first accrued after the making and after the registration of the deed, proceeds to aver that the plaintiff was not one of the creditors referred to, or intended to be bound by, the deed; thus tendering, though informally, the true issue in the cause, viz., whether the debt, under the whole circumstances stated, was barred by the deed. And the defendant, by joining issue upon the replication, puts himself upon the country on this issue. And the plea and the rejoinder taken together set forth in sufficient terms that the debt of the plaintiff was barred by the composition deed. Then the replication, being also informal, in that it does not shew that the plaintiff's debt was not barred by the deed, the judgment upon demurrer to both the plea and the replication ought to have been in favour of the defendant.

Upon the trial the verdict has been found for the defendant upon the plea, replication, and rejoinder, and we have, therefore, now to pronounce a final judgment upon the whole case; and, inasmuch as it now appears upon the finding of the jury that the debt in respect of which the plaintiff obtained judgment was barred by the composition deed, and that the certificate of the due registration of that deed was produced to the sheriff, he was justified in discharging Brassington, and there was no escape in point of law. The replication, therefore, even if good in law, not having been sustained in fact, the defendant becomes entitled upon the whole record to the judgment of the Court.

It is to be observed that this case is distinguishable from *Williams* v. *Rose* (1) in this—that the debt there was contracted, and not merely became due, after the date of the composition deed and registration.

(1) Law Rep. 3 Ex. 5.

We therefore decide that the judgment of the Court of Queen's Bench upon demurrer must be vacated, and the judgment for the defendant upon the issues in fact and upon the whole record affirmed.

The judgment of Channell and Cleasby, BB., and Keating and Montague Smith, JJ., was delivered by

CLEASBY, B. We think the judgment of the Court of Queen's Bench ought to be affirmed.

There was not only a demurrer but a special replication to the second plea, and also a demurrer to the replication. On the argument of the demurrers the judgment was for the plaintiff. But now, on the whole record, we think there is enough to shew that judgment for the defendant is the right judgment, and that final judgment for the plaintiff would be wrong.

The replication alleges that the plaintiff's cause of action against Brassington first accrued *after* the making and registration of the deed, and that the plaintiff was not a creditor when the deed was made, nor until after the certificate granted, &c., nor a creditor bound by the deed. Issue, in fact, was taken on this replication, and on the trial it was found for the defendant.

Now, the cause of action, assumed in the pleadings to exist, must have existed either before or after the deed, and the plaintiff must have been a creditor either before or after. When, therefore, the issue on the replication is found for the defendant, it is a *necessary* intendment from the verdict that the cause of action did accrue before the making of the deed, and the plaintiff was a creditor when it was made. And this being so, the facts which were wanting in the plea are supplied, and the whole record shews that the defendant was justified in discharging Brassington on the production of the certificate.

The intendment thus made is entirely consistent with the plea, which would be defective only by omitting to state the facts involved in the issue raised by the replication.

We do not think the entry of the judgment on the demurrer, which was correct in itself, interferes with the power of the Court to give the right judgment on the whole record, which the plaintiff has invited by availing himself of the right both to demur and reply. The facts appear on one and the same line of pleading,

1870

DIGNAM v. BAILY.

and the Court in giving judgment are, as it seems to us, bound to give judgment on all the facts averred, or to be necessarily implied, on that one line.

The rule that the judgment will be against the party whose pleading was first defective does not apply where the defects have been cured by pleading over or verdict: See Chitty on Pleading, 6th ed., p. 668; see also Com. Dig., Pleader, E. 37.

It is not correct to consider this as the case of two distinct answers by way of replication to the plea. If it was so, no doubt if the plaintiff succeeded upon one of those answers the plea would be answered, and the plaintiff entitled to judgment. But in reality the demurrer and the replication raise the same defence, viz., that the debt is not discharged by the deed, and as soon as it appears by the verdict of the jury that the debt is discharged by the deed, the only answer to the plea fails, and the defendant i entitled to judgment.

It seems clear that if there was no demurrer to the plea, the plea would be cured by the pleading over, and by the verdict. The defect complained of in the present case is the absence of a direct averment that the debt was discharged by the deed, which is left to be inferred from the general averment at the end of the plea. But the rule is thus stated in the note to Sanders' Reports, by Serjeant Williams, vol. i. p. 228, note 1. "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer; yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict."

The liberty to demur as well as reply, introduced of late years, can properly make no difference, when the ground of demurrer and only defect is the absence of a fact afterwards supplied.

In short, if the Court holds the plea bad it does so only because a fact is omitted; but as this fact is afterwards supplied, the Court ought to give judgment for the party who ought to succeed, and not to the person who ought to fail.

1870

DIGNAM v. BAILY.

The above conclusion is arrived at upon the supposition that the plea as it stood originally was defective, and that as it was demurred to, judgment ought to be given for the plaintiff upon the demurrer. But that is very questionable.

The second replication to the plea was also demurred to, and it was quite right to give judgment for the plaintiff upon the demurrer, because the replication was held to be a good answer to the plea. This was the ground upon which the judgment was given in the court below, and attention does not appear to have been called to the distinction, immaterial except as regards costs, between giving judgment for the plaintiff upon his demurrer to the plea, or upon the defendant's demurrer to the replication. (1)

We, of course, are not bound by the entry of the judgment upon the record, as we must give the proper judgment; and it appears to us, upon referring to the terms of the plea, that the plea as pleaded was a sufficient, though perhaps informal, primâ facie answer, and that the replication was a sufficient answer to the plea for the reasons given in the judgment of Lush, J. (1), so that judgment was properly given for the plaintiff upon the demurrer to the replication.

We think the plea sufficient, because it alleges that the defendant discharged Brassington in pursuance of the provisions of the statutes. This is in effect a statement that it was the duty of the defendant to discharge Brassington, or, in other words, that Brassington was entitled to be discharged. And this general statement is allowed when the particular facts are not in the knowledge of the party pleading, but of the opposite party (see Stephen on Pleading, 5th ed., pp. 407, 419), as is the case here. But if this be so, then, as the replication (though good in law) is put in issue and fails upon the facts, the issue being found for the defendant, it follows that the defendant is entitled to judgment.

Judgment for the defendant.

Attorneys for plaintiff: *Harper, Broad, & Manby.*
Attorneys for defendant: *Palmer, Palmer, & Bull.*

(1) Law Rep. 3 Q. B. at p. 180; it is to be observed that the Court merely give judgment for the plaintiff with reference to the replication, without referring to the plea.

1870
Nov. 24.

ROADS, Appellant; THE OVERSEERS OF TRUMPINGTON, Respondents.

Poor-rate—Exclusive occupation of Land—Excavation of Coprolites—Agreement—Construction.

It was agreed between A. and B. that A. should "forthwith enter upon" B.'s land, and there dig for coprolites in a specified manner, and should effectually fence the excavations and complete them by a given time, and should reinstate the land, and then "yield and deliver up" the land to B. There were no express words giving a right to the exclusive occupation of the land; but the excavations and works contemplated by the agreement required a constant occupation of the land by A. until the coprolites were raised, and the land could not be used for any other purpose from the commencement of the excavations until it had been reinstated, which could not be done for a year or more after the coprolites were raised. B. reserved to himself the right of going upon the land where the excavations were for the purpose of inspecting the works, but he was not required by the agreement to do anything upon the land:—

Held, upon the construction of the whole agreement, that A. had the right of exclusive occupation of the land, and that he was therefore liable to be rated to the relief of the poor in respect of such occupation.

Reg. v. *Smith* (3 E. & E. 383; 30 L. J. (M.C.) 74) discussed.

Case stated under 12 & 13 Vict. c. 45, on appeal to the Quarter Sessions of the county of Cambridge, against a poor-rate.

The rate was for the parish of Trumpington, in the county of Cambridge, and was made on the 29th of March, 1869. The appellant was rated as occupier of five acres of land, with an engine thereon, on a gross estimated rental of 43*l.* 10*s.*, and at a rateable value of 25*l.* 10*s.*

The five acres formed part of a farm of about 293 acres, belonging to Colonel Pemberton's trustees, and by them let to T. W. Bland as tenant from year to year under an agreement, by which the minerals and a right of entry to get them were reserved to the trustees, and under which the trustees were to make compensation to the tenant for land taken for getting coprolites and for surface damage thereby occasioned. At the date of the making of the valuation list and rate, Bland was tenant in occupation of the farm under this agreement. Underneath parts of the land, including the seventeen acres hereinafter mentioned, there were at the time of such demise beds of coprolites, which are fossil substances, varying in size from the size of a pea to that of a

hen's egg or thereabouts, and are of value for the purpose of making artificial manures. The trustees entered into an agreement, under seal, with the appellant whereby they conferred upon him certain powers for getting the coprolites.

The material parts of the agreement were as follows:—

Agreement made the 22nd of February, 1867, between H. W. Pemberton and E. F. Hodgson, hereinafter called "the landowners," of the first part, F. M. S. Pemberton of the second part, and Christopher Roads and Charles Roads, hereinafter called "the contractors," of the third part. It was agreed between the parties:

1. That the landowners shall, during a term of three years, from the 24th of December, 1866 (hereinafter designated "the said term") permit the contractors to enter upon and to dig, excavate, search for, carry away, and dispose of the coprolites in and out of such part as is now and shall from time to time hereafter be allotted by the agents of the landowners of and in all that piece of land, &c., &c., containing seventeen acres, and also of and in any land adjoining. [The land in which the appellants might search for and excavate coprolites was here specified.]

2. That the contractors shall forthwith enter upon such portion of the land as is now set out and allotted containing two acres or thereabouts, and within the first four calendar months of the said term, dig, excavate, search for, get, carry away, and dispose of the coprolites in and under the same, and afterwards in each and every subsequent four consecutive calendar months of the said term enter upon such other portion (being not less than two acres) of the land as shall be set out and allotted by the agents of the landowners, and shall within each and every such subsequent four consecutive calendar months, dig, excavate, search for, get, carry away, and dispose of the coprolites in and under the same except as to the last year; and should there be a larger quantity than six acres not dug at the commencement of such last year, the same shall be dug during such last year, and before the end of the said term. And further, that the contractors shall take the land, to be so dug and excavated, in such manner so as not to interfere with or inconvenience the tenant unnecessarily in the cultivation of such portions of the land as for the time being shall not be in a process of digging and excavation.

1870

ROADS v. OVERSEERS OF TRUMPINGTON.

3. Clause that the contractors should from time to time, as therein specified, give notice to the landowners of their desire that the agents of the landowners should set out some other portion of the land, not being less than two acres for the purpose of digging and excavating coprolites therefrom, and that the contractors should pay the agents for so doing as therein mentioned.

4. Clause that the contractors should preserve the draining pipes on the land so that the same might be afterwards used.

5. Clause that the contractors should, to the satisfaction of the landowners, preserve the top soil, which should be dug, and should reinstate in a specified manner the land where their excavations had been made, and in default, that the contractors should pay certain liquidated damages. And that the contractors shall at all times during the progress of the works keep the slurry (1) pits and soil banks clean and free from weeds, and will allow the tenant to cultivate such soil banks with roots, without any payment, should he elect to do so; but should he not so elect, then the contractors may cultivate them with roots, but in no case are they to be underlet.

6. That the contractors shall from time to time, after every portion of the land, which shall have been entered upon, dug, and excavated for coprolites, shall be restored to a proper state for cultivation pursuant to these presents, peaceably and quietly yield and deliver up the same unto the tenant.

7. Clause that the contractors should effectually fence all land in course of excavation or excavated.

8. Clause that the coprolites should be removed as therein specified, and that there should be no excavation within a fixed distance of certain quicks; and that the contractors shall not injure, nor permit to be injured, any quicks of the landowners, by digging or otherwise, but shall at all times during the term maintain and keep the quicks, fences, banks, and gates adjoining the said works in good repair; and at the end of the term leave the said quicks, fences, banks, and gates to the land in such good and proper repair.

9. Clause that the contractors should, as far as possible, prevent their workmen from trespassing on the land adjoining the works in

(1) For the meaning of "slurry," see infra, p. 61.

pursuit of game, and should not allow their workmen to come and go to and from the works except by specified paths.

10. That the contractors shall not, at any time, erect on the land any building except a shed for feeding the horses, and for the men employed in the exercise of the liberties and privileges hereby granted to take their meals in, and which shed is to be removed by and at the cost of the contractors when such liberties and privileges shall cease. [This clause contained also further provisions as to the mode in which the works were to be carried on.]

11. Provisions against assignment.

12. That the contractors shall pay the landowners 2,630*l.* 13*s.* for the coprolites in and under the land, containing seventeen acres, whether the same shall be dug and excavated or not, and also 153*l.* for every acre of the adjoining land wherein any coprolites shall be found, which the contractors shall enter upon and excavate for coprolites, or otherwise use or occupy under these presents. [Then came provisions that the money was to be paid per acre before the contractors entered on the land, as it was from time to time set out.]

13. If at any time during the term the contractors wish to give up the right to dig and remove coprolites under this agreement, it is agreed that they are to be at liberty to do so on paying to the landowners 300*l.* as a penalty for so doing.

14. The contractors shall bear and pay all taxes, rates, assessments, and impositions which shall be imposed upon the landowners, the tenant, and the contractors or any of them, for or in respect of the coprolites or otherwise, in respect of the liberties and privileges hereby granted, or any of the matters or things herein contained, except the rates now paid for the land by the tenant of the same.

15. Clause that the landowners should have a right of distress on the contractor's goods, to secure the payment of the royalties, rents, and liquidated damages under the agreement.

16. That the landowners or their agents may, at any time or times during the continuance of the liberties and privileges hereby granted, enter into and upon the land, in order to inspect the works.

17. Clause that all coins, fossils, antiquities, &c., &c., found on the land should be delivered to the landowners.

1870

ROADS v. OVERSEERS OF TRUMPINGTON.

18. Clause that if the contractors broke the covenants, or became bankrupt, &c., &c., the landowners should be entitled to determine the agreement.

19. Clause that all valuations and assessments of compensation under the agreement should be referred to arbitration as therein specified.

The trustees were the parties of the first part, and the appellant was the Charles Roads of the third part.

The appellant proceeded to get the coprolites under and in conformity with the provisions of the agreement, and at the time when the valuation list was made he had got and carried away the coprolites under about ten acres, and at the time of the making of the rate the appellant was working and getting the coprolites in two more acres, which had been set out and allotted by the agents of the trustees under clauses 2 and 3 of the agreement, and since the making of the rate the rest of the land mentioned in the agreement had been allotted to the appellant, and the coprolites therein had been worked and got by him accordingly.

The following is the modus operandi pursued by the appellant, and which is the ordinary one in such cases. The top soil (which is fit for cultivation) was carefully removed by the appellant for a convenient length and breadth of about four feet, then the subsoil was dug out till the coprolites were reached at a depth of about twelve feet; the coprolites, which form a bed varying from nine to twelve inches in thickness were then dug out, and then the same process was again gone through with a fresh piece of land until the whole allotted land was dug out and the coprolites carried away. Water was required for the purpose of washing the coprolites free from the earth and soil, in which they are embedded, and which adheres to them. For this purpose a well was sunk in the land, and a mound was raised by means of the subsoil dug from the pit excavated to get the coprolites, and in the mound was placed a hollow basin, or ring of iron, with an iron bottom, laid down, into which the coprolites as dug up were placed, and by means of a portable steam-engine the coprolites were washed free from the subsoil, and were then removed to a convenient spot near the high road to be carted away. The water in which the coprolites had been washed, and which from the quantity of soil

adhering to the coprolites formed a thick substance called "slurry," was run off from the iron basin into the pit from whence the coprolites were dug, and there remained until it became sufficiently dry and hard to receive back and support the subsoil. This period varies according to the nature of the soil from one to two or more years when the slurry becomes sufficiently hard and dry to support the subsoil. The subsoil was first spread over it and levelled, and then the surface soil, and the land was then, but not till then, fit for recultivation, and it was then, and then only, restored to the tenant. The trustees in each of the years 1867, 1868, and 1869, allowed to Bland an abatement from his rent of 3*l.* per acre for every acre dug by the appellant, and they also paid him from time to time 3*l.* per acre for surface damage. At the time of making the rate there were besides the two acres which were in course of being worked five acres of the ten out of which the coprolites had been worked which were still unfit for cultivation, and in the rate of the 29th of March, 1869, Bland's assessment was reduced from 293 acres, the entire acreage of his farm, to 288 acres, the difference of five acres being the quantity considered to be rendered unproductive to him from time to time by the working of the coprolites.

The engine on the land was a portable steam-engine of ten horse-power, standing on wheels, and not in any way attached to the soil. The rate was intended and estimated to last for a period of six months.

The questions for the opinion of the Court were: 1. Was the appellant rateable; 2. If so, for what portion of the land included in the agreement of the 22nd of February, 1867.

Alfred Wills, for the appellant. The appellant cannot contend that the excavations for coprolites are mines; and therefore the only question is, whether the appellant was in exclusive occupation of the five acres of land for which he is rated. The agreement amounts to a sale of the coprolites to the appellant, with leave to enter on the land and get them, but there are no words of demise in the agreement. On the contrary, the appellant's interest is called his "liberties and privileges" in pars. 10, 14, and 16. This shews that the parties treated the appellant's right as a mere easement, and not as a right of exclusive occupation as against the trustees.

1870

ROADS v. OVERSEERS OF TRUMPINGTON.

In par. 13 the appellant's right in the land is called "the right to dig and remove coprolites." The case is like that of a sale of standing timber, or a contract to build a house; neither the purchaser of the timber nor the builder would have exclusive occupation of the land. They would have a right to go on the land for a specified purpose, but not a right to exclude the owner. In *Reg.* v. *Morrish* (1) it was held that an occupation of a part of the building of the Exhibition of 1862 for the purpose of selling refreshments did not render the occupier liable to be rated.

[BLACKBURN, J., referred to *Reg.* v. *Smith.* (2)]

The trustees did not part with their right of occupation: *Doe* d. *Hanley* v. *Wood* (3); *Rex* v. *St. Austell.* (4)

[BLACKBURN, J., referred to *Crosby* v. *Wadsworth.* (5)]

As to the second point, it is difficult to say that the appellant was not in occupation of five acres if he was in occupation of any land under the agreement.

Crompton Hutton, for the respondents, was not called upon.

BLACKBURN, J. I am of opinion that the Sessions were right on both points. The appellant was in occupation of the land in respect of which he was rated, and he was therefore properly rated. The value of the land was, of course, increased by the raising of the coprolites, but we have nothing to do with the amount of rate. The first question is, as to the occupation of the land by the appellant. If he had a mere easement over the land, he was not in occupation, and could not properly be rated. It is sometimes difficult to say whether a given use of land amounts to an occupation, or only to an easement. A familiar case is that of furnished lodgings, where the lodger has the exclusive use and enjoyment of one or more rooms. By the agreement between the owner of the house and the lodger the servants of the owner clean the rooms, light the fires, &c., &c. The servants have constantly to go into the rooms to perform these duties, and the occupation of the rooms is by the person who thus employs servants to look after them. The case of a chartered ship is another illustration of

(1) 32 L. J. (M.C.) 245. 10 Jur. N. S. 74.
(2) 3 E. & E. 383; 30 L. J. (M.C.) 74.
(3) 2 B. & A. 724.
(4) 5 B. & A. 693.
(5) 6 East, 602.

this doctrine. Although the whole use of a ship may be given to the charterer, the captain and crew nevertheless remain the servants of the shipowner, and the charterer therefore has not the right to the exclusive occupation of the ship: *Dean* v. *Hogg.* (1)

In the case of *Reg.* v. *Smith* (2) there was an agreement by which the appellant contracted to let five rooms to the Board of Inland Revenue. [The learned judge read the terms of the agreement in *Reg.* v. *Smith* (2), as stated in the judgment of the case.] And the Court say: "We must look not so much to the words as the substance of the agreement, and taking the whole together we think it must be construed not as a demise of the five rooms, but as an agreement by which the appellant retaining possession of these rooms and keeping his servant there bound himself to supply the other party with fire, gas, and attendance." It was accordingly held that the appellant remained the occupier of the five rooms and was rateable as such, and that the Crown was in the position of an inmate or lodger.

The most material parts of the present case are contained in par. 2 and par. 6 of the agreement. These two paragraphs, by the words "enter upon" and "deliver up," clearly shew an intention by the trustees to give the right of occupation to the appellant from the time of entry upon the land until it was delivered up. The context does not cut down these words, but, on the contrary, it fortifies the view that the agreement gives a right of exclusive occupation. If the landlord had to do anything on the land, as to drain it, the case might come within the principle of *Reg.* v. *Smith.* (2) Such facts might shew that the possession remained in the landlord, and might cut down the apparent effect of the words of the agreement. Instead of this being the case, however, the agreement provides that the contractors are to do everything that is to be done on the land. [The learned judge went through the chief things which the contractors had agreed to do.] These are acts which could hardly be done without the sole and exclusive possession by the appellant of the land in question.

Even without such strong words as are used in parr. 2 and 6, I think that the whole nature of the agreement shews that the appellant was intended to have exclusive possession of the land.

(1) 10 Bing. 345. (2) 3 E. & E. 383, 390; 30 L. J. (M.C.) 74, 77.

1870

ROADS v. OVERSEERS OF TRUMPINGTON.

The case is somewhat like *Crosby* v. *Wadsworth* (1), where it was held that the vendee of a crop of growing grass had a right of exclusive occupation of the land until the grass was cut and carried away, and that he could maintain an action for trespass to the land. The principle of *Crosby* v. *Wadsworth* (1) applies to this case. There are, first, the words in par. 2, that "the contractors shall forthwith enter upon" the land. Secondly, the nature of what the appellant was to do under the agreement, to which I have already referred, and which required a right of exclusive occupation; and, thirdly, the words of par. 6. There is nothing in the agreement to cut down the effect of these considerations, and I think, consequently, that the appellant was in occupation of the land.

The cases *Rex* v. *Austell* (2), and *Doe* d. *Hanley* v. *Wood* (3), do not bear directly upon the point in this case. The doctrine that the produce of mines can be rated, although mines cannot, is very peculiar, and rests upon authority alone. *Rex* v. *Austell* (2), therefore, affords us no criterion for deciding a case like the present. In *Doe* d. *Hanley* v. *Wood* (3), the grantee might, perhaps, have had a right to bring ejectment for mines within the limits of his workings. So here I should think that after entry and before yielding up the land, the appellant might have maintained ejectment and recovered possession from one in occupation of the land.

As to the question of the number of acres for which the appellant was rated, it is not easy to see how the number of five acres was ascertained, but the appellant was clearly in occupation of five acres at least, and I think we cannot interfere.

MELLOR, J. I am of the same opinion. Some of the words of the agreement, if disconnected from the rest of the agreement, might induce one to think that the appellant had only a licence to work on the land, and was not in occupation of the land. We find, however, by par. 2 that the appellant is to "enter upon" the land. After the appellant has dug the coprolites he is to restore the ground, and do other things to the land under par. 5. The

(1) 6 East, 602. (2) 5 B. & A. 693.
(3) 2 B. & A. 724.

1870

READS v. OVERSEERS OF THURMASTON.

object of the agreement was to sell the coprolites, and I think that a right of exclusive occupation of the land was given for that purpose. The agricultural tenant was only to recover possession of the land when it had been levelled and restored by the appellant. This is the fair result of the agreement, and the appellant is therefore in occupation of the land, and, consequently, is properly rated.

We cannot inquire as to the amount of the rate. The only question really before us is as to the appellant's rateability. The whole question is determined by the answer that the appellant was in occupation of the five acres, and therefore was rateable.

Judgment for the respondents.

Attorneys for appellant: *Church, Sons, & Clarke, for Thurnall & Nash, Royston.*

Attorneys for respondents: *Sharpe, Parker, & Co.*

ALLEN *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Nov. 22.

Master and Servant—Railway Company, Responsibility of, for Acts of Servants—Arrest of Person supposed to have attempted a Felony.

A clerk in the service of a railway company, whose duty it is to issue tickets to passengers, and receive the money, and keep it in a till under his charge, has no implied authority from the company to give into custody a person whom he suspects has attempted to rob the till, after the attempt has ceased: as such arrest could not be necessary for the protection of the company's property. And the company is therefore not liable for the act of the clerk.

DECLARATION for assault and false imprisonment.

Plea: not guilty. Issue thereon.

At the trial before Blackburn, J., at the Middlesex sittings after Hilary Term, 1870, it was proved that the plaintiff asked at the Twickenham Station of the defendant's railway for a second-class ticket for Waterloo Station, for which he tendered in payment a two-shilling piece. The booking-clerk gave the plaintiff the ticket, together with some change, and amongst the change he gave the plaintiff a French coin of two sous, which the plaintiff

1870

ALLEN v. LONDON AND SOUTH WESTERN RAILWAY CO.

refused to accept, and insisted that the clerk should give him a penny instead. The clerk declined to take back the French coin, and it was alleged that the plaintiff reached over the counter, and attempted to put his hand into the bowl of the till, which contained copper coin. The clerk thereupon seized the plaintiff, and called a policeman of the company on duty at the station to take the plaintiff into custody. The policeman at first refused, but on the clerk insisting that he should take him into custody, did so, and afterwards gave the plaintiff into the charge of a Metropolitan policeman, who took him to the police-station, where he was locked up for the night. He was taken before a magistrate the next morning, and charged with feloniously attempting to rob the till at the defendants' station at Twickenham. The magistrate dismissed the charge.

The learned judge left it to the jury to say whether the booking-clerk acted for his own ends, and out of spite, because he had not succeeded in forcing the French coin on the plaintiff, in which case the defendants would not be liable for his act, or whether the booking-clerk acted in furtherance, as he supposed, of his employers' interest to protect their property. The jury found that the booking-clerk was acting in defence of the company's property, and returned a verdict for the plaintiff for 100*l.*

The learned judge reserved leave to the defendants to move to enter a nonsuit.

A rule was afterwards obtained to enter a nonsuit pursuant to leave reserved, on the ground that there was no evidence to go to the jury that the defendants had expressly or impliedly authorized the acts of which the plaintiff complained; or for a new trial on the ground that the verdict was against the evidence on the point left to the jury.

Seymour, Q.C., and *Steele*, shewed cause. The railway company are liable for the act of their clerk. The duty of the clerk is to issue tickets, and to receive the money paid for them, on behalf of the company. This money is placed in the till of which the clerk has the custody. He has therefore an implied authority to put the law in force to protect his employers' property; and if the clerk bonâ fide thought that the plaintiff was attempting to steal

1870

ALLEN v. LONDON AND SOUTH WESTERN RAILWAY CO.

money out of the till, and to prevent the consummation of the act, gave the plaintiff in charge, the company are liable. If the plaintiff had actually committed a felony, the clerk for the protection of his employers' interests might lawfully have given the plaintiff in charge.

[BLACKBURN, J. If the plaintiff had actually taken the money, and after pursuit he had been captured, and given into custody to get back the money, that would be a totally different case.]

It is drawing too fine a line to say that a person in charge of property cannot interfere for its protection until after a felony has been committed. Whether he acts to prevent an attempt at felony, or to get back property after a felony, in either case, he acts for the protection of the property, and has an implied authority to do all those things which are right and proper for its protection. Numerous cases shew that where a railway company or other body entrust a person with certain duties, they clothe him with authority to do those things on their behalf, which are right and proper in the exigencies of their business. He has an implied authority and a discretion to act on all emergencies that occur in the business with which he is entrusted: *Poulton* v. *South Western Ry. Co.* (1); *Goff* v. *Great Northern Ry. Co.* (2); In *Limpus* v. *London General Omnibus Co.* (3), the law is shewn to be that a master is responsible for the improper act of his servant, even if it is wilful, reckless, or improper, provided the act is the act of the servant in the scope of his employment, and in executing the matter for which he was engaged at the time. Here the clerk was the guardian of the till, and is specially appointed to protect the defendants' property. The giving the plaintiff into custody is an act of an agent acting within the scope of a particular duty. *Edwards* v. *London and North Western Ry. Co.* (4) is, at first sight, an authority against the view presented on behalf of the plaintiff; but in that case, as pointed out by Montague Smith, J., the cause of the arrest was not at all connected with the company's business, and

(1) Law Rep. 2 Q. B. 534.
(2) 30 L. J. (Q.B.) 148; 3 E. & E. 672.
(3) 32 L. J. (Ex.) 34; 1 H. & C. 526.
(4) Law Rep. 5 C. P. 445, 450.

1870

ALLEN v. LONDON AND SOUTH WESTERN RAILWAY CO.

the learned judge says: "I am by no means prepared to say that there may not be officers who, from the special circumstances of their appointment, have power to arrest offenders in the name of the company; for example, policemen appointed by the company to watch their stations; so a superior officer may have a right to exercise all the power which the company would have under the circumstances." Brett, J., says (1), "If an officer be appointed expressly to watch the company's property, I should think if he took an innocent person into custody on the charge of stealing, it might well be said that the company were liable." The clerk here is somewhat in the position of a policeman appointed to watch the company's property, he is in charge of the till, and the money it contains, and invested with authority to do all acts for its protection, and the defendants are liable for his acts.

Denman, Q.C., and *Mangles*, in support of the rule, were not heard.

BLACKBURN, J. There can be no doubt that the plaintiff has been very ill used, as he was most improperly arrested, but, unfortunately, he has sued the wrong person, and, therefore, the rule to enter a nonsuit must be made absolute.

The question is, whether there is any evidence of an authority given by the defendants to the booking-clerk to arrest the plaintiff under the circumstances of this case. It is quite clear that there was no evidence of an express authority. Then can such authority be implied? The facts from which an authority can be implied are, that the person who arrested the plaintiff is a ticket-distributor in the employ of the defendants; that he gives out tickets to persons intending to travel by the railway, and receives the money, and that the money received on behalf of the defendants is put into a till of which he has the charge and custody; on these facts, it may be fairly said that the booking-clerk has an implied authority to do all acts which are necessary for the protection of the money entrusted to him. I am inclined to think that, if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody,

(1) Law Rep. 5 C. P. at p. 451.

the person in charge of the till might have an implied authority to arrest the offender; or if the clerk had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the property taken away, it might be that that also might be within the authority of a person in charge of a till. I am not, however, prepared to pronounce a decided opinion on these supposed cases; the present case is altogether different. There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property, it is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company—which is a corporation—and a private individual; if the law were that the defendants are responsible for the act of their booking-clerk in giving the plaintiff into custody on an unfounded charge, every shopkeeper in London would be answerable for any act done by a shopman left in his shop who chose to accuse a person of having attempted to plunder the shop, every merchant would be responsible for a similar act of his clerk, and every gentleman for the act of his butler or coachman. The principle which governs the present case has been laid down in the cases that have been cited: there is an implied authority to do all those things that are necessary for the protection of the property entrusted to a person, or for fulfilling the duty which a person has to perform. To apply that principle to the present case, the booking-clerk had an implied authority to do everything that was necessary for the fulfilment of the duty entrusted to him, but he had no implied authority to punish for a supposed infringement of the law. This distinction runs through all the cases. For instance, where a company have under a bylaw a power to arrest a man if he does not pay his fare, the primary object of the bylaw is to enforce the payment

1870

ALLEN v. LONDON AND SOUTH WESTERN RAILWAY CO.

of fares to the company and to protect their interest, and it has been rightly held that, when a company leave a servant in charge of a station, he has an implied authority to decide that the bylaw shall or shall not be enforced; but if the servant in charge of a station does an act in no way connected with the business of the company, there would be no implied authority for the act, and the company would not be liable: as was decided in *Poulton* v. *London and South Western Ry. Co.* (1). *Edwards* v. *London and North Western Ry. Co.* (2) lays down the same principle. The plaintiff in that case was given into custody by a porter in the defendants' employ, who happened at the time to be in charge of a station, on a charge of having stolen timber which was lying near the station. The act of the porter was not a thing done in the exigencies of the traffic of the company, and the Court of Common Pleas held that the porter, who was placed in charge of a station, had no implied authority to give the plaintiff into custody on such a charge. So here it cannot be said a clerk, whose duty it is to issue tickets, had an implied authority to give the plaintiff into custody. With regard to the act of the policeman, he was at the station for the purpose of enforcing the bylaws of the company, but there is no ground for saying that he had an implied authority to arrest the plaintiff, simply because the booking-clerk said, "I insist upon your taking him in charge." The policeman was not bound to obey such an order. I think, therefore, that there is a total failure of evidence to shew that the clerk was acting within the scope of his authority in giving the plaintiff into custody, and that neither the clerk nor the policeman had any authority to arrest the plaintiff, when the arrest could only be for the purpose of vindicating public justice, and not for the purpose of protecting the property of the company.

MELLOR, J. I am entirely of the same opinion. As I understand, the person whose conduct gave rise to this action was what was called a ticket-distributor, that is to say, the person who behind a counter sells tickets to those who want to travel by the railway. He seems erroneously to have thought that the plaintiff in putting his hand in the till had some bad intention, but the hand

(1) Law Rep. 2 Q. B. 534. (2) Law Rep. 5 C. P. 445.

had afterwards been withdrawn, and the plaintiff was on the other side of the partition. The duty of the booking-clerk was to issue the tickets; but it was no part of his duty to give persons into custody who had made some attempt which did not succeed upon the till. I think, therefore, the opinions of the judges in *Edwards* v. *London and North Western Ry. Co.* (1) are strictly applicable to the circumstances, and I agree with what is said by all the three judges in that case. My Brother Keating puts it: "There seems no ground for saying that what was done was in the ordinary course of the business of the company, nor that it was for their benefit, except in so far as it is for the benefit of all the Queen's subjects that a criminal should be convicted. If Holmes acted from a sense of the duty which rests on every one, to give in charge a person whom he thinks is committing a felony, his conduct would in no way be connected with the defendants." It appears to me that very accurately applies to the condition of things here; only in the present case no felony had been committed, nor even a misdemeanour. My Brother Smith says, "There is no evidence whatever on which a presumption of authority from the defendants to apprehend the plaintiff can be founded, except the fact that the person who authorized his apprehension was a foreman porter, and in charge of the station at the time when the plaintiff was supposed to be stealing the defendants' property. I think an authority to apprehend the plaintiff cannot be presumed to have been conferred on the foreman in this case. No doubt if in furtherance of the particular business of the company it is necessary to arrest a person, the servants of the company have an implied authority to do it; thus, if there is a bylaw of the company and power to arrest any person infringing it, it must be presumed that the company give authority to any one they put in charge of the station so to enforce it, since this can only be done by the company's servants on the spot." That is quite right, and accurately expresses the rule which governs similar cases. My Brother Brett, evidently referring to a similar person, although not using the precise expression, says: "In this case the company had not, I think, authorized Holmes to protect their goods by giving into custody any one he thought right, and it was not their ordinary

(1) Law Rep. 5 C. P. 445.

1870

ALLEN v. LONDON AND SOUTH WESTERN RAILWAY CO.

way of carrying on their business." That case appears to me in principle to govern this, and I am content to rest my judgment on what is enunciated by the three judges to whom I have referred. I therefore come to the conclusion that there is no evidence of any authority from the defendants to act as the ticket-distributor acted, and therefore they are not liable.

LUSH, J. I am of the same opinion. The defendants cannot be held liable for this wrongful act of the clerk, unless the act was done by their authority, express or implied. No express authority has been proved, and we cannot presume the clerk had any other authority than what is to be implied from the duties he was called upon to perform. As a ticket-distributor, the clerk had entrusted to him the tickets and the money he should receive for the tickets, and his duty to the company was to do all that was necessary to protect that property for the company. If the plaintiff here had been guilty of all that was imputed to him, the property of the company would have been in no danger. What is alleged against him is, that he had attempted to rob the till, not that he was attempting. It could not be needful to give him into custody to prevent it, for he had ceased to make the attempt, if ever he was guilty of it. There was no duty on the part of the clerk to punish him for the attempt which had ceased. The property of the company not being in danger, the clerk had no implied authority to act as he did, and upon that ground I think the company are entitled to judgment.

HANNEN, J. I am entirely of the same opinion. The proposition Mr. Seymour asks us to affirm is this, that every servant who is entrusted with the property of his master has an implied authority to put the law in motion with reference to any offence that may be committed in connection with that property. I think that is a proposition wholly unsupported by authority, and would lead to very grievous consequences if it was established. Therefore I agree with my learned Brothers.

Rule absolute to enter a nonsuit.

Attorneys for plaintiff: *Gold & Son.*
Attorney for defendants: *Crombie.*

TEBBUTT *v.* THE BRISTOL AND EXETER RAILWAY COMPANY. 1870
Dec. 10.

Master and Servant—Negligence—Respondeat Superior—Railway Company.

The stations of the defendants and of two other railway companies at B. adjoin, and are open to one another, and the passengers of each company are in the habit of passing directly from one to the other, the whole area being used as common ground by the passengers of all three companies. While the plaintiff was standing on the defendants' platform, on his way from the terminus of one of the other companies to the booking-office of the other company, waiting for his luggage, a porter of the defendants negligently drove a truck laden with luggage, and a portmanteau fell off and injured the plaintiff:—

Held, that as the negligence complained of was an act of misfeasance by a servant of the defendants in the course of his employment, the maxim "Respondeat superior" applied; and that under the circumstances the defendants were liable.

Quære, whether the defendants would have been liable if any injury to the plaintiff had resulted from the state and condition of the platform upon which the plaintiff had been allowed to enter.

DECLARATION, that the defendants, by their servants, so negligently and unskilfully managed a truck, or barrow, laden with luggage at a certain railway station at which the plaintiff then lawfully was, that a portmanteau, being part of such luggage, fell from the truck, or barrow, and struck against the plaintiff and injured him.

Pleas: 1. Not guilty. 2. That the plaintiff was not lawfully at the railway station.

Issue thereon.

At the trial before Hannen, J., at the sittings in London after Michaelmas Term, 1869, it was proved that the plaintiff had arrived at Bristol from Gloucester by a train of the Midland Railway Company, and intended to go to Bath by the Great Western Railway. In order to go from the Midland Railway premises to the Great Western it was necessary to cross over a platform in the possession of the defendants. The plaintiff and other persons were so passing when a porter in the employ of the defendants' company came in an opposite direction with a hand-truck heavily laden with luggage. As he was passing the plaintiff a portmanteau fell from the truck, and struck the plaintiff's leg, causing a severe injury. The facts of the case are more fully stated in the judgment of the Court.

1870

TEBBUTT v. BRISTOL AND EXETER RAILWAY CO.

It was contended on behalf of the defendants that as the plaintiff was not on the platform of the station on any business of the defendants', but merely as a licensee using the platform for his own convenience, the defendants were not liable. The learned judge reserved leave to the defendants to move to enter a nonsuit on this point. The jury found a verdict for the plaintiff for 300*l.*

A rule was obtained to enter a nonsuit pursuant to the leave reserved; or for a new trial, on the ground that there was no evidence of negligence, and that the plaintiff by his conduct contributed to the injury complained of.

Nov. 14. *Powell, Q.C.*, and *Anderson*, shewed cause, and contended that there was evidence of negligence, and on this point they cited *Briggs* v. *Oliver* (1), *Bryne* v. *Boadle* (2), and *Nicholson* v. *Lancashire and Yorkshire Ry. Co.* (3) They also contended that the plaintiff was not a mere licensee, and cited *Holmes* v. *North Eastern Ry. Co.* (4), and *Corby* v. *Hill.* (5)

Sir J. B. Karslake, Q.C., and *J. Digby*, in support of the rule. On the first point they cited *Cornman* v. *Eastern Counties Ry. Co.* (6), *Smith* v. *Great Eastern Ry. Co.* (7), *Collis* v. *Selden* (8), and *Giblin* v. *M'Mullen.* (9) On the second point they cited *Hounsell* v. *Smyth* (10), and *Southcote* v. *Stanley.* (11)

The judgment of the Court renders it unnecessary to report the arguments at length.

Cur. adv. vult.

Dec. 10. The judgment of the Court (Cockburn, C.J., Mellor, Lush, and Hannen, JJ.) was delivered by

HANNEN, J. This was an action for an injury received on the platform of the defendants' station at Bristol. A verdict was found for the plaintiff for 300*l.*, subject to leave to enter a nonsuit if there was no evidence of the liability of the defendants, which ought to have been left to the jury.

(1) 35 L. J. (Ex.) 163.
(2) 2 H. & C. 722; 33 L. J. (Ex.) 13.
(3) 34 L. J. (Ex.) 84.
(4) Law Rep. 4 Ex. 254.
(5) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318. 6 Jur. N.S. 512.
(6) 4 H. & N. 781; 29 L. J. (Ex.) 94.
(7) Law Rep. 2 C. P. 4.
(8) Law Rep. 3 C. P. 495.
(9) Law Rep. 2 P. C. 317.
(10) 7 C. B. (N.S.) 731; 29 L. J. (C.P.) 203. 6 Jur. N.S. 847
(11) 1 H. & N. 247; 25 L. J. (Ex.) 339.

C. P. S. C. 10 Jur. N.S. 1107.

1870

TEBBUTT v. BRISTOL AND EXETER RAILWAY CO.

The plaintiff, a passenger by the Midland Railway Company from Gloucester to Bristol, being desirous of proceeding at once from Bristol to Bath, went from the terminus of the Midland towards the Great Western booking-office, through the station belonging to the defendants. It appeared that the stations of three companies, viz., the Great Western, the Midland, and the Bristol and Exeter, adjoin and are open to each other, and the passengers of each company have long been in the habit of passing from one of the stations to another without regard to whether the intermediate ground belonged to the line by which they had come or the line by which they wished to depart. The whole area had been used as common ground by the passengers of all three companies according as their convenience required. There were two ways by which the booking-office of the Great Western might have been reached from the Midland terminus, where the plaintiff had alighted, one of which led round by and along part of the platform of the Bristol and Exeter. This latter was the way generally used, and it had been so used for several years, and the plaintiff, who was in the habit of travelling that route, had frequently used it before.

The accident in question occurred while the plaintiff was standing on the defendants' platform, on his way from the Midland terminus to the Great Western booking-office, waiting for the porter to come up with his luggage. It happened that a porter of the defendants came up driving a truck heavily laden with luggage, and having to turn round a corner close by where the plaintiff was standing, he turned so sharply that a portmanteau fell off and struck against the plaintiff's leg, doing him considerable injury. For this injury the action was brought.

It was contended that, assuming this to have been an act of negligence on the part of the porter, for which the defendants would have been responsible to a passenger by their own line, yet that the company were not responsible to the plaintiff, inasmuch as he was neither a passenger of theirs, nor a person who was on their premises on any business in which they were interested, but was a mere licensee using the platform for his own convenience.

It is unnecessary to consider what would have been the rights of the parties if the plaintiff's complaint had reference merely to the state and condition of the platform upon which he was allowed to

1870

TEBBUTT v. BRISTOL AND EXETER RAILWAY CO.

enter. What he complains of is an act of misfeasance done by a servant of the defendants in the course of his employment—the doing carelessly what the servant was employed to do, and which caused damage to the plaintiff. In such case the maxim "Respondeat superior," as a general rule, applies. The exception is where the injured party stood at the time of the injury in such a relation to the master that it may reasonably be presumed he agreed to undertake the risk arising from the negligence of those whom the master employed. The distinction is thus put by Lord Cranworth in *Bartonshill Coal Company* v. *Reid* (1): "So far as persons external to the master and his servants are concerned, the master is to be considered as responsible for every one of those servants, . . . but the case is different where the question arises within the circle of the master and his servants." And again: "The principle which makes the master liable to complaints made ab extra does not make him liable to complaints arising intra the whole body consisting of himself and his workmen." Upon this ground the master is held irresponsible for injuries done by one servant to another in the course of their common employment, or to a person who, by volunteering to assist a servant, puts himself in the position of the latter: *Potter* v. *Faulkner* (2); or to a guest in his house, who becomes for the time being a member of his family: *Southcote* v. *Stanley*. (3) The plaintiff stood in no such relation. He was allowed the use of the defendants' platform in the same manner and upon the same conditions as if he had been one of their passengers, and is as "external" to the defendants and their servants as he would have been if the accident had happened to him in the public street. The rule will be discharged.

Rule discharged.

Attorney for plaintiff: *Ditton.*

Attorney for defendants: *Byrne, for Fussell & Prichard, Bristol.*

(1) 3 Macq. at pp. 276-277. (2) 1 B. & S. 800; 31 L. J. (Q.B.) 30.
(3) 1 H. & N. 247; 25 L. J. (Ex.) 339.

JONES *v.* HARBER.

1870
Nov. 28.

Bankrupt—Assignment of the whole of a Trader's Property—Pressure—Fraudulent Preference.

R., a trader, under pressure assigned all his property to the plaintiff, a creditor, without fraud and without intention to prefer. R. was at the time insolvent, and was a few days afterwards adjudged a bankrupt on his own petition :—

Held, that, though the assignment would have amounted to an act of bankruptcy, yet, as it could not be avoided as an act of bankruptcy, it was not fraudulent and voidable by the assignees without fraud in fact.

7 Ch. 326
542
13 Ch. D. 24

DECLARATION. That the defendant seized and took the goods of the plaintiff, that is to say, household furniture and stock in trade, and converted the same to his own use.

Plea : Not guilty, by statute 12 & 13 Vict. c. 106, s. 159.

Issue thereon.

At the trial before Martin, B., at the Liverpool winter assizes, 1869, the following facts were proved. The plaintiff claimed under a bill of sale the goods mentioned in the declaration, and the defendant, who was the messenger of the Court of Bankruptcy, had seized the goods under an order of the Court. One Roberts, who carried on the business of a wholesale and retail woollendraper at Llanrwst, had assigned all his furniture and the whole of his stock in trade to the plaintiff, his brother-in-law, by a bill of sale dated the 20th of May, 1869, in consideration of a pre-existing debt of £500. The assignment was made by Roberts under a threat by the plaintiff of legal proceedings. At the time Roberts executed the bill of sale he owed other creditors 1200*l.*, and his assets consisted, with the exception of his stock in trade and furniture, of a very small amount of book debts. Roberts stated that he did not then contemplate bankruptcy. He had been sued by another creditor and was hopelessly insolvent. On the 26th of May he was adjudged bankrupt on his own petition.

The learned judge directed the jury that, as the bill of sale had been given under pressure, and Roberts had been adjudged a bankrupt on his own petition, the plaintiff was entitled to a verdict, and a verdict was accordingly entered for the plaintiff for 425*l.*, leave being reserved to the defendant to move to enter a verdict for him or a nonsuit.

1870

JONES v. HARBER.

A rule was afterwards obtained to enter a nonsuit or verdict for the defendant, pursuant to the leave reserved, on the ground that it appeared from the evidence that the assignment of the 20th of May, 1869, was fraudulent, and had been avoided by the assignees of Roberts, and that such assignment was fraudulent and voidable although made under pressure; or for a new trial, on the ground that the judge had misdirected the jury, in telling them that the assignment was not fraudulent and voidable because made under pressure, and that the assignees could not avoid it because Roberts was bankrupt upon his own petition; and also on the ground that the verdict was against the weight of evidence.

Nov. 16. *Davison, Q.C.*, and *Leofric Temple*, shewed cause. First, two things must concur to make the assignment to the plaintiff void. It must be made voluntarily, and also in contemplation of bankruptcy: *Morgan* v. *Brundrett.* (1) The facts shew that the assignment was made under pressure, and that Roberts did not contemplate bankruptcy. If the transaction between Roberts and the plaintiff was a bonâ fide transaction, not entered into with the intention of defeating or delaying creditors, all the cases shew that it is a valid transaction: *Bills* v. *Smith* (2); *Shrubsole* v. *Sussams* (3); *Pennel* v. *Reynolds* (4). Secondly, the adjudication was on the bankrupt's own petition, therefore there is no relation back so as to enable the assignees to avoid the assignment as an act of bankruptcy: *Stevenson* v. *Newnham* (5); *Marks* v. *Feldman.* (6)

Holker, Q.C., and *R. G. Williams*, in support of the rule. The assignment was given for a bygone debt, and it was of the whole of the trader's goods and effects, the assignment therefore is of itself a fraud on the bankrupt laws and void. This is clear from what Lord Mansfield laid down in *Rust* v. *Cooper* (7): "Every case that has determined a conveyance by a trader of his whole effects, to pay a creditor, to be an act of bankruptcy, proceeds on this foundation; that it is fraudulent against the bankrupt

(1) 5 B. & Ad. 289.
(2) 6 B. & S. 314; 34 L. J. (Q.B.) 68. 11 Jur (N.S.) 153.
(3) 16 C. B. (N.S.) 452.
(4) 11 C. B. (N.S.) 709.
(5) 13 C. B. 285; 22 L. J. (C.P.) 110. 17 Jur 660
(6) Law Rep. 5 Q. B. 275.
(7) Cowp. at p. 632.

laws, and therefore void." So, in *Alderson* v. *Temple* (1), Lord Mansfield stated that "the statute (2) says fraudulent conveyances shall be an act of bankruptcy; other acts that are fraudulent are not made acts of bankruptcy, but they are attended with the consequences of fraud at law, which is that fraud renders every act void." Again, in *Woodhouse* v. *Murray* (3), it was laid down that the principle is that though there may be an absence of intentional fraud, yet when the effect of a conveyance is to put it entirely out of the debtor's power to go on with his business, "he is guilty of fraud against the policy of the bankrupt law, which is that there should be an equal distribution among all the creditors." This case was cited with approbation in *Ex parte Foxley.* (4) The principle of *Young* v. *Fletcher* (5) is strictly in accordance with these cases. The assignment being of itself fraudulent and void, as being against the policy of the bankrupt law, the doctrine that the title of the assignees does not relate back has no application: *Marks* v. *Feldman.* (6)

Cur. adv. vult.

Nov. 28. The judgment of the Court (Blackburn and Hannen, JJ.), was delivered by

BLACKBURN, J. This was a case tried before Martin, B. Upon the trial it appeared that the bankrupt, a trader, had under pressure assigned all his property to the plaintiff, a creditor. As the case is reserved, we must take it that there was no fraud, such as would have made this assignment void against creditors, if bankruptcy had not ensued; nor any intention to prefer the creditor to others under a bankruptcy then in contemplation, so as to amount to a fraudulent preference; but it must necessarily have prevented the trader from paying any others of his creditors, and the plaintiff must have known it would have that effect. Soon after the trader became bankrupt on his own petition.

The verdict was directed to be entered for the plaintiff, leave being reserved to enter it for the defendant. A rule was obtained

(1) 4 Burr. at p. 2239.
(2) 1 Jac. 1, c. 15, s. 2.
(3) Law Rep. 2 Q. B. at p. 638.
(4) Law Rep. 3 Ch. Ap. 515, 519.
(5) 3 H. & C. 732; 34 L. J. (Ex.) 154.
(6) Law Rep. 5 Q. B. 275.

1870

JONES v. HARBER.

accordingly, against which cause was shewn in last term before my Brother Hannen and myself.

In the case of *Young* v. *Fletcher* (1) it was decided that an assignment by a trader of his property, such that if acted upon it must necessarily prevent him from carrying on his trade and so delay or defeat his creditors, is an act of bankruptcy wholly irrespective of any fraud. We must, therefore, consider this transaction as an act of bankruptcy, and had the bankruptcy in the present case been on the petition of a creditor so that the title of the assignees would have related to the act of bankruptcy, the defendant would undoubtedly have been entitled to the verdict. But, being on the trader's own petition, there can be no relation back.

The contention on the part of the defendant, therefore, was that such a transaction, though there was no fraud in fact against any one, and no intention to defeat the operation of the bankrupt laws, was by operation of law fraudulent as against the assignees of the trader if bankruptcy should supervene, and might be avoided by them: though, as in the present case, there could be no relation to it as an act of bankruptcy: or though, in the case of an adjudication on the petition of a creditor, the transfer, if more than a year previous to the adjudication, could not be relied on as an act of bankruptcy.

The words of the Bankruptcy Acts (12 & 13 Vict. c. 106, s. 67; 24 & 25 Vict. c. 134, s. 70) now repealed, are that any "fraudulent" transfer of the trader's goods, made by a trader "with intent to defeat or delay his creditors," should be an act of bankruptcy. The argument for the defendant was that if this was an act of bankruptcy, it must be because it was fraudulent, and if fraudulent at all as against the assignees, it must be voidable at their option.

We were much disposed on the argument to hold that, though a long series of cases have established that the construction to be put on the enactment was such that a transfer, the necessary effect of which was to delay or defeat the trader's creditors, was an act of bankruptcy, though there was no fraudulent intent at all, yet that it did not follow that we were to hold such a transfer voidable by the assignees unless there was fraud in fact. Mr. R. G. Williams on the argument cited the earlier cases, and succeeded in shewing

(1) 3 H. & C. 732; 34 L. J. (Ex.) 154.

that originally such a transfer had been considered by Lord Mansfield and the judges in his time as fraudulent in fact; and as the point may have an important bearing on the construction of the Bankruptcy Act, 1869, s. 6, subs. 2, we took time to consider (1). We find, however, that the point has been decided in the case of *Mercer* v. *Peterson* (2). There a bill of sale was actually executed within twelve months before the adjudication, but it was in furtherance of an agreement made more than twelve months before the adjudication. The Court of Exchequer, or at all events, the Chief Baron and Martin, B., thought that the transfer must be considered as relating back to the day on which it was agreed that it should be made, and that therefore it could not be treated as an act of bankruptcy, and could only be avoided if really fraudulent. The Exchequer Chamber (3) affirmed the judgment on a different ground as they thought that the transfer must be considered as made at the time the bill of sale was actually executed, but that it was not such a transfer as necessarily to delay and defeat creditors: and this appears to have been the ground on which Channell, B., in the court below, had rested his judgment. We cannot therefore treat the ground on which Kelly, C.B., and Martin, B., had based their judgment as affirmed in error, but it was certainly not reversed, and on that authority, agreeing as it does with our own impression, we act.

The rule must therefore be discharged.

Rule discharged.

Attorneys for plaintiff: *Chester & Urquhart.*
Attorneys for defendant: *Paterson & Co.*

(1) By 32 & 33 Vict. c. 71, s. 6: A debtor may be adjudged a bankrupt on the ground, inter alia, (2) "that the debtor has in England or elsewhere made a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof."

(2) Law Rep. 2 Ex. 304.

(3) Law Rep. 3 Ex. 104.

1870
Nov. 28.

PARTRIDGE *v.* ELKINGTON.

County Court—Action against High Bailiff—9 & 10 Vict. c. 95, s. 138—Adjoining District under sec. 138—19 & 20 Vict. c. 108, s. 21.

By 9 & 10 Vict. c. 95, s. 138, all actions against any person for anything done in pursuance of the statute shall be laid and tried in the county where the fact was committed. By 19 & 20 Vict. c. 108, s. 21, if an action be brought against an officer of a county court, the summons may issue in the district of which he is an officer, or in any adjoining district, the judge of which is not the judge of a court of which the defendant is an officer:—

Held, that, assuming s. 138 applied to an action in a county court against a high bailiff for not executing a warrant of another county court, yet the action might be brought under s. 21 in any district adjoining the district of which he is an officer although in a different county.

APPEAL from the County Court of Staffordshire holden at Oldbury.

The plaintiff sued the defendant, who was the High Bailiff of the County Court of Warwickshire holden at Birmingham, to recover damages for having neglected to execute a warrant against the goods of one Richard Peters, issued in an action at the suit of the plaintiff against Peters, and in which action judgment had been obtained in the Birmingham County Court.

The County Court of Staffordshire, holden at Oldbury, is an adjoining county court to the County Court of Warwickshire, holden at Birmingham.

The case was tried before a jury.

At the trial it was contended by the defendant that the Oldbury County Court had no jurisdiction to try the plaint, and that the action should have been brought in an adjoining county court, in the county in which the act complained of was committed, that is to say, in the county of Warwick, under 9 & 10 Vict. c. 95, s. 138. (1) On the other hand, it was contended by the plaintiff

(1) 9 & 10 Vict. c. 95, s. 138: "And for the protection of persons acting in the execution of this Act, be it enacted, that all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act, shall be laid and tried in the county where the fact was committed, and shall be commenced within three calendar months after the fact committed, and not afterwards or otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action, and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action

1870

PARTRIDGE v. ELKINGTON.

that the action was rightly brought in the Oldbury County Court, in Staffordshire, under 19 & 20 Vict. c. 108, s. 21, (1) it being a county court adjoining the County Court of Warwickshire, holden at Birmingham. It was further contended for the defendant that the plaintiff ought to have demanded under 13 & 14 Vict. c. 61, s. 19, the perusal and copy of the warrant, inasmuch as the action charged him with neglecting or refusing to execute a warrant directed to him as high bailiff. It was contended for the plaintiff that the present action was for a neglect or an omission to do an act, and not for any act done in pursuance of the statute.

The jury found a verdict for the plaintiff, and the judge ordered the cause to be struck out on the first point raised by the defendant, on the ground that he had no jurisdiction, and further directed that in case it should be ruled that he had jurisdiction and the cause should be restored, a nonsuit should be entered upon the second point. But if both points were decided in favour of the plaintiff, the verdict should stand.

The questions for the opinion of the Court were whether the action was properly brought in the County Court of Staffordshire, and whether the plaintiff was bound to demand a perusal and copy of the warrant.

G. Francis, for the plaintiff. Section 138 of 9 & 10 Vict. c. 95, does not apply to actions brought in the county court, it only applies to actions in the superior courts. The ground of action is for refusing to execute a warrant; that is an act of omission, whereas the section applies to things done in pursuance of the Act: *Umphelby* v. *M'Lean*. (2) The section does not apply to an omission: *Davis* v. *Curling* (3); nor to a nonfeasance: *Joule* v. *Taylor*. (4) Section 21 of 19 & 20 Vict. c. 108, is an enabling section, and the language is wide enough to permit the plaintiff

---

brought, or if after action brought a sufficient sum of money shall have been paid into court, with costs by or on behalf of the defendant."

(1) 19 & 20 Vict. c. 108, s. 21: "If an action be brought against an officer of a county court, the summons may issue in the district of which he is an officer, or in any adjoining district the judge of which is not the judge of a court of which the defendant is an officer.

(2) 1 B. & A. 42.

(3) 8 Q. B. 286.

(4) 7 Ex. 58; 21 L. J. (Ex.) 71.

1870

PARTRIDGE v. ELKINGTON.

to bring his action in any adjoining district. With regard to the second point, s. 19 of 13 & 14 Vict. c. 61, does not apply to this case. It enacts that no action shall be brought against any high bailiff for anything done in obedience to any warrant. A neglect to execute the warrant cannot come within these words.

[BLACKBURN, J. That section cannot possibly apply to a neglect to execute a warrant.]

The defendant did not appear.

BLACKBURN, J. I think we ought to decide that the plaintiff is entitled to recover in the action brought in the Oldbury County Court, although the act complained of was done or committed in Warwickshire. The 9 & 10 Vict. c. 95, s. 138, is for the protection of persons acting in execution of the Act, and if that were the material section in this case the question might arise, whether the words "actions and prosecutions" in that section include plaints in the county courts, as well as proceedings in the superior courts. I think it likely that the framers of the Act meant to refer only to proceedings in the superior courts, although it is difficult to see why notice of action is not required before suing in the county court as well as in the superior court. The provision as to venue certainly seems to apply to the superior court only, because in the county court the action must be brought in the district within which the defendant dwells, and not in the county where the act is done, and therefore there is no necessity to direct the cause of action to be tried in a particular district. A further question arises, whether an action for an omission to fulfil a duty imposed by the statute can be considered an action for something "done in pursuance of the Act." It would be going a great length to hold that it is to be so considered, and I should hesitate if it were necessary to give our decision upon this section. *Joule* v. *Taylor* (1) is a decision difficult to be understood. But whatever may be the interpretation to be put on s. 138 of 9 & 10 Vict. c. 95, it becomes quite clear on referring to 19 & 20 Vict. c. 108 what our decision ought to be. By s. 19 it is clear that when the judge of a county court is a plaintiff the action is to be brought in the county court of any adjoining district of which he is not the

(1) 7 Ex. 58; 21 L. J. (Ex.) 31.

judge. This power did not exist before; it is a new provision. By s. 20 an action in which an officer of the county court is plaintiff is not to be tried before the judge of the court to which he is attached, but may, at the request of the defendant, be removed to a district of another judge. Then follows s. 21, which applies to the present case, and which enacts that the officer of a county court may be sued in the district of which he is an officer, or in any adjoining district the judge of which is not the judge of a court to which he is attached. I think that the legislature intended to give an option to the plaintiff in selecting the court in which he is to sue; and that if it were clear that 9 & 10 Vict. c. 95, s. 138, had been intended to apply to a case like this, 19 & 20 Vict. c. 108, s. 21, must be construed to have a more general application, and to mean that although a plaintiff may still sue under the provisions of the earlier statute, yet if he does not think fit to do so, he shall have the privilege of suing in any adjoining district which may be more convenient. And the necessity of this provision will appear more obvious that in some counties the same judge presides over every court held within them, so that if the plaintiff were compelled to sue in an adjoining district of the same county he must sue before the judge who is judge of the court of which the defendant is an officer.

MELLOR, J., concurred.

LUSH, J. I am of the same opinion. I do not think it necessary to decide whether s. 138 of 9 & 10 Vict. c. 95 applies to the present case, because if it does, 19 & 20 Vict. c. 108, s. 21, must be taken to qualify its effect. The words "adjoining district," used in the latter Act, require a wide interpretation, and mean any adjacent district to that in which the defendant is an officer, without reference to whether it is within the limits of the same county.

Judgment for the plaintiff.

Attorneys for plaintiff: *Few & Co.*

1870
Nov. 9.

GARETTY, Appellant; POTTS, Respondent.

Beerhouse—Certificate for Renewal of Licence—Qualification of House—3 & 4 Vict. c. 61, s. 1, 32 & 33 Vict. c. 27, ss. 8, 9.

By 3 & 4 Vict. c. 61, s. 1, it is enacted that no licence to sell beer by retail shall be granted to any person who shall not be the real resident occupier of a dwelling-house . . . nor shall such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor on a rent or annual value of 15*l.*

By 32 & 33 Vict. c. 27, ss. 8, 9, the justices are not to refuse a certificate except on certain grounds, one of which is that the house or shop wherein beer is to be sold is not duly qualified. The appellant occupied a house and shop, which were together rated in the sum of 15*l.*; the house and shop were attached to and communicated with each other, and the shop was used for the sale of groceries and beer:—

Held, that the shop was part of the premises occupied with the house within the meaning of s. 1, of 3 & 4 Vict. c. 61, and that in ascertaining the rateable rate of the house the value of the shop might be taken into account.

Case stated by Justices of Blackburn, under 20 & 21 Vict. c. 43.

At an adjourned annual licensing meeting, holden for the borough of Blackburn, on the 19th of September, 1869, an application under the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), was made to the justices, by the appellant, for a certificate for the renewal of a licence to sell by retail ale, beer, and porter in his house and premises, situate at Friday Street in the borough, occupied by the appellant, theretofore used and kept by him as a retail beerhouse. By 3 & 4 Vict. c. 61, s. 1, reciting 11 Geo. 4 & 1 Wm. 4, c. 64, and 4 & 5 Wm. 4, c. 85, it is enacted that no licence to sell beer by retail under the recited Acts or this Act, shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed, nor shall any such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the township or place in which such house and premises are situate, on a rent or annual value of 15*l.* per annum at the least, if situate in the cities of London, &c., or any town corporate, &c., the population of which shall exceed 10,000, &c.

By the Wine and Beerhouse Act, 32 & 33 Vict. c. 27, s. 19, it is enacted that where, on the 1st of May, 1869, a licence under any of the recited Acts is in force in respect to any house or shop for the

sale of beer, &c., to be consumed on the premises, &c., it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, &c., to be consumed on the premises, in respect of any such house or shop, except on one or more of the grounds upon which an application for a certificate under this Act, in respect of a licence for the sale of beer, &c., not to be consumed on the premises, may be refused in accordance with this Act, and by sect. 8 of the Act, the grounds are, amongst others, that the applicant or the house, in respect of which he applies, is not duly qualified as by law is required.

Upon the hearing of the application it was proved on the part of the appellant, and found as a fact, that all notices of his intention to apply for a certificate had been duly served as required by the Wine and Beerhouse Act, 1869. That the appellant occupied a house and shop in Friday Street, in the borough, which were together assessed to the relief of the poor of the township of Blackburn in the sum of 15*l.*, and that the appellant was duly qualified as by law required. That the house and shop were attached to and communicated with each other, and that the shop was used for the sale of groceries and beer.

It was objected that that portion of the house and premises occupied for the sale of beer was not duly qualified, inasmuch as without the shop it would not be rated in a sufficient sum to entitle the appellant to a licence.

It was contended on behalf of the appellant that as the house and shop were both used and occupied for the sale of beer, and were assessed together, and communicated with each other, they came within the meaning of the words "house and premises occupied therewith" as mentioned in 3 & 4 Vict. c. 61, and within the meaning of the words "house or shop" as mentioned in ss. 8 and 19 of 32 & 33 Vict. c. 27, and were therefore duly qualified as by law required.

The justices decided that the appellant was not entitled to such certificate by reason of his occupying part of such house and premises as a shop.

The question for the opinion of the Court was whether, under s. 19 of 32 & 33 Vict. c. 27, the justices were justified in refusing the application upon the grounds above stated, inasmuch as by it

1870

GARRETT v. POTTS.

the justices are precluded from refusing a certificate, except upon one or more of the four grounds mentioned in s. 8 of the Act. (1)

Gorst, for the appellant. If the dwelling and the premises occupied therewith are rated at the sum of 15*l.* the statute is complied with, although a portion of the premises may be used for other purposes than selling beer. In this case the house and shop are both used and occupied for the sale of beer, and they are together comprehended in the word "house."

Lister, for the respondent. The house and premises were not of sufficient value without including the shop, and the shop cannot be deemed part of the house for the purpose of ascertaining its value within the meaning of the statute, because it was used for a different purpose.

Gorst was not heard in reply.

BLACKBURN, J. This case is most clear. The appellant, being a qualified person possessed of a beerhouse previously licensed, is entitled to have the license renewed, unless his house is not qualified. By the terms of 3 & 4 Vict. c. 61, s. 1, the dwelling-house, with the premises occupied therewith, must be rated at 15*l.* per annum. Here the dwelling-house is occupied with a shop; and if the dwelling-house is taken without the shop it is not rated in the proper sum; but if the shop is included the rating is sufficient. Had the statute said "the dwelling-house and premises used and occupied therewith for the purpose of selling beer," another question would have arisen. But here the shop was occupied with the dwelling-house for which the license was required; and I think, therefore, that the justices were wrong.

LUSH, J., concurred.

Judgment for the appellant. (2)

Attorneys for appellant: *Shaw & Trevelle.*

Attorney for respondent: *W. Compton Smith.*

(1) In *Wise v. Potts* (Nov. 21, before Mellor and Lush, JJ., which was precisely similar case, the Court ordered the case to be struck out, on the ground that a case could not be stated under 20 & 21 Vict. c. 43, on the refusal of a certificate, under 23 & 24 Vict. c. 27, as that 20 & 21 Vict. c. 43 only applied to the determination of justices "not otherwise empowered."

(2) See the next two cases.

THE QUEEN, on the Prosecution of CRUTCHLEY and Others, JUSTICES OF BERKS, Respondents, *v.* PILGRIM, Appellant. 1870 Nov. 12.

Beerhouse—Certificate for Renewal of License—Practice on Appeal—Hearing of Fresh Evidence as to Character—Wine and Beerhouse Act, 1869, 32 & 33 Vict. c. 27, s. 8, subs. 1, s. 19—9 Geo. 4, c. 61, s. 27.

By 32 & 33 Vict. c. 27. s. 8. all the provisions of 9 Geo. 4, c. 61, as to granting licences and as to appeal shall, so far as may be, have effect as to granting certificates under this Act, subject to this qualification that no certificate in respect of a license to sell beer, &c., not to be consumed on the premises shall be refused, except on one of the grounds following: 1. That the applicant has failed to produce satisfactory evidence of good character. By s. 19, where, on the 1st of May, 1869, a licence is in force with respect to any house for the sale of beer, &c., to be consumed on the premises, a certificate in respect of such house shall not be refused except on one of the grounds mentioned in s. 8. The 9 Geo. 4, c. 61, s. 27, gives an appeal, in general terms, to any person aggrieved by any act of a justice acting under the statute.

Justices in licensing sessions refused a certificate for the renewal of a licence, under s. 19, on the ground that the applicant had failed to produce satisfactory evidence of good character. The applicant then appealed to quarter sessions:—

Held, that fresh evidence of character was admissible before the quarter sessions, and if that was satisfactory, the appellant was entitled to a certificate.

8 QB 148
6 QBD 32

At the Berkshire October Quarter Sessions, 1869, an appeal was heard, in which James Pilgrim was the appellant and certain justices of the Windsor division of the county were respondents.

1. The appeal was against a refusal of the respondents to grant to the appellant a certificate under 32 & 33 Vict. c. 27, for the purpose of enabling the appellant to renew a licence to sell beer by retail, to be consumed on the premises: the sessions dismissed the appeal, subject to the following case. (1)

(1) By 32 & 33 Vict. c. 27, after reciting 11 Geo. 4 & 1 Wm. 4, c. 64, 4 & 5 Wm. 4, c. 85, 3 & 4 Vict. c. 61, 24 & 25 Vict. c. 21, 26 & 27 Vict. c. 33, and 23 & 24 Vict. c. 27, it is enacted, by s. 4, that after the 15th of July, 1869, no licence, or renewal of a licence, for the sale by retail of beer, cider, or wine, under the provisions of any of the recited Acts, shall be granted except upon the production of a certificate granted under this Act; and by s. 5, certificates under this Act shall be granted by the justices assembled at the general licensing meeting held in pursuance of 9 Geo. 4, s. 61.

s. 8: "All the provisions of the said Act of 9 Geo. 4, c. 61, as to the terms upon which, and the manner in which, and the persons by (*sic*) whom grants of licences are to be made by the justices at the said general annual licensing meeting, and as to appeal from any act of any justice, shall, so far as may be,

1870

THE QUEEN v. PILGRIM.

2. At the hearing of the appeal it was proved that the appellant and many others being respectively persons whose licences were in force on the 1st of May, 1869, within the meaning of 32 & 33 Vict. c. 27, s. 19, duly applied to the said justices sitting in petty session on the 28th of August, 1869, for such certificates, and that upon the hearing of the applications the course of proceedings was as follows:—

3. Unless the police who were present had anything to allege against the particular applicant whose case was under consideration, the justices granted the application as a matter of course. In cases where the police had anything to allege against the applicant

---

have effect with regard to grants of certificates under this Act, subject to this qualification, that no application for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine, not to be consumed on the premises shall be refused, except upon one or more of the following grounds, viz.:—

"1. That the applicant has failed to produce satisfactory evidence of good character.

"2. That the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character.

"3. That the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licence, or from selling any of the said articles.

"4. That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required."

s. 19: 'Where, on the 1st of May, 1869, a licence under any of the recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine, to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine, not to be consumed on the premises, may be refused, in accordance with this Act. . . .'

By 9 Geo. 4, c. 61, s. 27, "Any person who shall think himself aggrieved by any act of any justice, done in or concerning the execution of this Act, may appeal to the next general or quarter sessions," on giving certain notices and entering into certain recognizances; "and the Court at such sessions shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs, as to the said Court shall seem meet; and in case the act appealed against shall be the refusal to grant or transfer any licence, and the judgment under which such act was given be reversed, it shall be lawful for the said Court to grant or to transfer such licence. . . .'

1870

THE QUEEN v. PILGRIM.

the justices generally called upon the applicant to produce evidence of his good character; and they accepted as such evidence without objection, and without inquiring into the genuineness of the signatures, memorials purporting to be signed by respectable neighbours of the applicant.

4. James Pilgrim, the appellant, who was not represented by any professional man, upon making his application, tendered no evidence of his character. The police alleged in his presence that he had been convicted of Sunday trading, and had been in the habit of harbouring thieves and bad characters. These statements were not contradicted by the appellant, and the respondents, therefore, refused to grant the certificate. Immediately after such refusal, the appellant tendered to the respondents a memorial purporting to be signed by thirty-five neighbours as to his character, and the way he conducted his business. The signatures to this document were all genuine, but one of the persons signing it had many years ago been convicted of felony, and some one or two other of them had been convicted of poaching, assaults, and other like offences.

5. The respondents read and considered the memorial, but declined to alter their former determination, and refused the certificate on the ground that the appellant failed to produce before them satisfactory evidence of his good character. At the hearing of the appeal, evidence was then tendered by the appellant to shew that the house in question was respectably conducted, and to prove that certain thieves and persons of bad character, who were proved to have frequented the appellant's house, were not knowingly harboured by him. It was objected by counsel for the respondents that the issue before the quarter sessions was not whether the appellant's character was in fact good, but whether he had given such evidence of his good character to the justices in petty sessions as ought to have been reasonably satisfactory to them, and that evidence of the appellant's good character not submitted to the justices below was irrelevant to the issue and inadmissible.

6. The quarter sessions were of opinion that the evidence adduced by the appellant before the justices below was not reasonably sufficient, and that the appellant had failed under s. 8, subs. 1, of the 32 & 33 Vict. c. 27, to produce satisfactory evidence

1870

THE QUEEN v. PILGRIM.

of good character before the justices below. The quarter sessions, however, heard the evidence tendered by the appellant de bene esse, and found, in point of fact, that on the hearing of the appeal the appellant had produced before them satisfactory evidence of good character; but they ruled that such evidence was irrelevant and inadmissible, and upon that ground made an order dismissing the appeal and refused to grant the certificate.

The question for the opinion of the Court was, whether the appellant, upon giving to the quarter sessions on appeal evidence of his good character, satisfactory to them, but not submitted to the justices below, was legally entitled under 32 & 33 Vict. c. 27, s. 8, to require the quarter sessions to receive such evidence, and to grant the certificate.

Harington, for the respondents. The quarter sessions were right in dismissing the appeal. By the Wine and Beerhouse Act, 1869, 32 & 33 Vict. c. 27, s. 8, the provisions of 9 Geo. 4, c. 61, as to licences and appeals are to apply to the granting of certificates under the Act of 1869; and 9 Geo. 4, c. 61, s. 27, gives an appeal to a party aggrieved in general terms; but then s. 8 says it shall be subject to the qualification that a certificate for a licence to sell beer not to be consumed on the premises shall not be refused, except on one of the following grounds: First, that the applicant has failed to produce satisfactory evidence of good character. By s. 19 a certificate for a renewal of a licence to sell beer to be consumed on the premises is put on the same footing. No doubt the decision of the justices can be reviewed on appeal; and in general on an appeal fresh evidence may be given, but then reference must be had to the issue on which the decision proceeded, and a fresh issue cannot be raised: *Rex* v. *Jeffreys*. (1) The issue here was, whether the appellant failed to produce satisfactory evidence of good character on his original application for a certificate; as to this the quarter sessions find in the affirmative, and the fresh evidence was irrelevant to the issue. It is said that on appeal fresh evidence may be adduced, because the whole matter is at large, but that is too wide an expression to be generally applicable. This rule appears to be founded on *Rex* v. *Commissioners of Appeal* (2);

(1) 1 B. & C. 604. (2) 3 M. & S. 133.

1870

THE QUEEN v. PILGRIM.

that was the case of a conviction where the issue was simply guilty or not guilty.

[MELLOR, J. The language of s. 8, subs. 1, is very peculiar, but are not the qualifications introduced only to limit the grounds of refusal?]

No doubt in some sense; and as to the other grounds, fresh evidence may be admissible on appeal, the question being on the facts: on the first ground the fact to be decided is, not whether the appellant is of good character, but whether he failed to produce evidence before the justices of good character, an entirely different issue.

[LUSH, J. Suppose the application had been for a certificate, as to a house not previously licensed, for the sale of beer to be drunk upon the premises; and the justices having full discretion in the matter refused the certificate on the ground that the applicant was not of good character: on appeal fresh evidence of character would have been admissible.]

No doubt, because ss. 8 and 19 do not apply; here by s. 8, subs. 1, the ground of refusal is the failure to produce satisfactory evidence on the application. To allow fresh evidence would be to transfer the granting of licences from the licensing justices to the quarter sessions.

[LUSH, J. That argument would apply to all appeals under any of the Licensing Acts.]

Poland, for the appellant. The contention of the respondents substantially goes to take away the right of appeal. The general rule as decided in *Rex* v. *Commissioners of Appeal* (1) is, that when an appeal is given it is a re-hearing of the whole matter, and fresh evidence may be received, unless the statute giving the appeal limits the inquiry, as in 48 Geo. 3, c. 74, s. 15, 7 & 8 Geo. 4, c. 53, s. 84, and 4 & 5 Wm. 4, c. 51, s. 24, by which the quarter sessions on appeal are only to hear the witnesses who were examined or tendered in the court below, and no others. Here 9 Geo. 4, c. 61, s. 27, gives an appeal without any limitation. The object of all the qualifications was, as already pointed out by the Court, to limit the grounds of refusal of certificate. And the difference of the language of subs. 1 to that in the other subsections was only in

(1) 3 M. & S. 133.

1870

THE QUEEN v. PILGRIM.

order to shift the onus from the police of proving bad character to the applicant, who must produce satisfactory evidence of good character. Under subss. 2 and 3 the police would have to prove the house to be disorderly, or that the applicant had forfeited a previous licence for misconduct, but, under subs. 1, the appellant must himself produce evidence of good character.

MELLOR, J. I certainly have had considerable doubt whether the peculiar words used in s. 8, subs. 1, might not have been intended by the legislature to limit the inquiry as to character, on an appeal to the quarter sessions, to the question whether the justices below ought to have refused the certificate on the evidence adduced before them; but I think, when we come to look at the other part of the section and the previous general law on the subject of appeal, it was only intended to limit the grounds on which a certificate might be refused, and it was not intended to narrow the inquiry on an appeal to quarter sessions. It would be very strange if, in the case where the justices have a discretion to grant or refuse a certificate, their decision could be reversed by the quarter sessions after hearing additional evidence, and yet where the justices have no discretion, but are bound to grant the certificate on the applicant fulfilling certain conditions, one of which is, that he proves he is of good character, the quarter sessions should not be at liberty to hear fresh evidence. What I take to be the object of the legislature in s. 19 as to the renewal of licences to sell beer to be consumed on the premises, and as to the granting of fresh licences under s. 8, is this, not to allow to the justices in petty and quarter sessions any wide discretion in refusing the certificate, and to confine the power of refusal to the specific grounds mentioned, one being that the applicant has failed to produce satisfactory evidence of good character. The quarter sessions find that the evidence before the petty sessions was not satisfactory; but they find, as *a fact*, that the applicant's character is good; and it would certainly be hard to limit the appellant to the evidence given in the court below, and not allow the question of character to be reviewed on all the evidence he could bring forward; it would really be putting an applicant for a renewal of a licence in a worse position than an original applicant.

1870

THE QUEEN v. PILGRIM.

Mr. Poland's argument has convinced me that the object was not to limit the evidence or mode of conducting the appeal, but only to limit the grounds on which a certificate might be refused. The whole matter was therefore open on appeal as to all the grounds on which the certificate had been refused by the petty sessions; and the question is, in effect, is the appellant of good character, in point of fact, not merely whether the evidence which he produced to the court below ought to have satisfied the justices as to his character? The quarter sessions ought therefore to have acted on the fresh evidence, and granted the certificate, and there must be judgment for the appellant accordingly.

LUSH, J. I am also of opinion that the appellant was entitled to his certificate, the quarter sessions having found, as a fact, that on the additional evidence before them he had produced satisfactory evidence of good character. Generally speaking, on appeal to the quarter sessions the justices are not limited to the evidence before the petty sessions, but they have to hear the whole matter de novo, and the issue is the same, and the justices are put in the same position as the justices in the court below. It is only in cases in which the particular statute giving the appeal limits the inquiry to the same evidence, that the quarter sessions are precluded from going into fresh evidence, and instances of this limitation occur in the statutes mentioned by Mr. Poland; but where there is no such limitation, either expressly or by implication, the matter is at large, and the quarter sessions are to rehear the whole matter, and give their judgment upon all the evidence that is brought before them. In the present case the appeal clause, s. 27 of 9 Geo. 4, c. 61 (which is imported into the Act of 1869) is general in its terms; and the question therefore is simply this: was the peculiar phraseology used in s. 8, subs. 1, of the Act of 1869 intended to limit the functions of the quarter sessions on appeal, or was it framed for some other purpose? By s. 19 the applicant is entitled absolutely to a certificate for the renewal of a licence to sell beer to be consumed on the premises, unless any of the grounds exist on which a licence to sell beer not to be consumed on the premises may be refused under s. 8; and these are: 1. That he has failed to produce satisfactory evidence of good character; 2. That the

1870

THE QUEEN v. PILGRIM.

house is of a disorderly character; 3. That he has forfeited a previous licence for misconduct; 4. That he or the house is not duly qualified as by law required. The second and third of these grounds are to be proved against him, and the contrary must, primâ facie, be assumed in his favour; but as to the first, the peculiar phraseology is used, as it appears to me, in order to throw the onus on the applicant of shewing that he *is* of good character, which might otherwise also have been assumed in his favour until the contrary were shewn; and the language was not intended to limit the functions of the court of appeal to an inquiry as to whether the appellant had, on his original application to the court below, failed to produce satisfactory evidence of his good character. The meaning is, that the applicant, in order to be entitled to a certificate, shall produce affirmative evidence of his good character. That seems to me a satisfactory explanation of the use of the words. The question before the quarter sessions is, therefore, precisely the same as that in the court below: has the applicant produced before the court satisfactory evidence of good character? Where the quarter sessions find, as in the present case, that he has, he is entitled to his certificate.

Judgment for the appellant. (1)

Attorneys for appellant: *Burton & Co. for R. H. Horne, Staines.*
Attorneys for respondents: *G. L. P. Eyre & Co.*

(1) See the next case.

THE QUEEN *v.* THE JUSTICES OF LANCASHIRE.

IN RE TYSON'S APPEAL.

1870
Nov. 24.

Beerhouse—Certificate for New Licence to sell Beer to be consumed on the Premises—Discretion of Justices in granting New Licence—32 & 33 Vict. c. 27, ss. 5, 8, 19—9 Geo. 4, c. 61, ss. 1, 9.

On an application under 32 & 33 Vict. c. 27, for a certificate for a licence to sell beer to be consumed on the premises, in respect of a house not previously licensed, the justices have the same discretion as to granting or refusing the certificate as they have in granting or refusing a licence under 9 Geo. 4, c. 61; and they may and ought to take into consideration the number of houses in the neighbourhood already licensed, and refuse the certificate if they think an additional beerhouse unnecessary or undesirable in the interest of the public.

MOTION for a rule calling upon the Justices of Lancashire, in quarter sessions assembled, to shew cause why a mandamus should not issue commanding them to hear certain evidence in an appeal of W. H. Tyson against the refusal by certain justices of a certificate under the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27).

It appeared from the affidavit on which the motion was made that on the 26th of August, 1870, Tyson applied to the justices at the annual licensing meeting for the petty sessional division of Manchester for a certificate under 32 & 33 Vict. c. 27 (1), to enable him to obtain a licence to sell beer to be consumed on the premises in respect of a certain house; the application being an original application, and not by way of renewal.

The justices, after hearing evidence, refused the certificate on the ground that there was no necessity for another beerhouse in the neighbourhood.

Tyson thereupon appealed to the quarter sessions. At the hearing, on the 28th of October, 1870, it was admitted on behalf of the respondent justices that the character of the appellant was satisfactory, and that the house was sufficiently rated; but the respondents' counsel tendered evidence to shew that there was no want or necessity in the neighbourhood of the appellant's house for an additional beerhouse. The reception of the evidence was opposed by the appellant on the ground that, the fitness of the

(1) For sections of 32 & 33 Vict. c. 27, see ante, p. 89.

1870

THE QUEEN v. LANCASHIRE JUSTICES.

appellant and of the house being conceded, the sessions had no right to inquire into circumstances raising the question of the wants of the neighbourhood, and were precluded from entering upon any such inquiry.

The sessions rejected the evidence on the above ground, and granted the appellant his certificate, subject to the opinion of the Court of Queen's Bench as to whether the evidence was rightly rejected; and they adjourned the sessions for the purpose of obtaining that opinion.

Nov. 23. *Holker, Q.C.*, and *Leresche*, argued in support of the motion. They cited *Reg.* v. *Sylvester*. (1)

Manisty, Q.C., and *Torr*, shewed cause in the first instance.

The nature of the arguments fully appears from the judgment of the Court.

Cur. adv. vult.

Nov. 24. The judgment of the Court (Lush and Hannen, JJ.) was delivered by

LUSH, J. This application was made for the purpose of eliciting the opinion of the Court upon the question, whether, in the exercise of their discretion in granting or refusing a certificate for a licence to sell beer to be consumed on the premises in respect of a house not before licensed, the justices are limited to inquiries as to the character of the person applying, or whether they may and ought to take into consideration also the requirements of the neighbourhood. The respondents proposed to shew that the neighbourhood was amply supplied with beerhouses. The sessions rejected the evidence, holding that the fitness of the applicant and the fitness of the house being conceded, they had no right to inquire into the circumstances raising the question as to the wants of the neighbourhood.

It was contended on behalf of the appellant, first, that the powers of justices under the recent Act (32 & 33 Vict. c. 27) were not co-extensive with their powers under the Licensing Act, 9 Geo. 4, c. 61; and, secondly, that even if they were, the discretion of the justices, under the Act of Geo. 4, was limited to the personal fitness of the applicant.

(1) 2 B. & S. 322; 31 L. J. (M.C.) 93.

It will be convenient to dispose of the second branch of the argument before considering the Act upon which the question immediately arises.

The 1st section of 9 Geo. 4, c. 61, after directing the justices to hold annual general licensing meetings, enacts, that "it shall be lawful for the justices, acting in and for such county or place, assembled at such meeting to grant licences to such persons as they, the said justices, shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper." The argument was, that as the fitness of the person only is mentioned, all other considerations are to be excluded; and, that condition being satisfied, the justices are bound to grant the licence.

That this is too narrow a construction is evident from the 9th section of the same Act, the words of which are, that "when any question touching the granting, withholding, or transferring any licence, or the fitness of any person applying for such licence, or of the house intended to be kept by such person, shall arise, such questions shall be determined by the majority of justices, not being disqualified, who shall be present when such questions shall arise."

Here the personal fitness of the applicant is put as one of several elements, the fitness of the house is assumed to be another, and, over and above these two, other considerations, not specified or defined, are supposed to exist, and to influence the decision. There is nothing in any part of the Act which suggests what these other considerations may or may not be, nothing which gives to the applicant a right to demand a licence, nor any words importing an obligation on the part of the justices to grant it under any given state of things. It is therefore obvious that the words relied on by the appellant point not merely to the merits of the applicant, but must be read in a wider sense, as referring to the merits of the application; and they authorize, and therefore by implication require the justices to govern their discretion, in granting or withholding the licence, by reference not only to the qualification of the person applying and to the suitableness of the house, but to other considerations also. Those considerations must include the nature of the locality, the population, the number of

1870

THE QUEEN v. LANCASHIRE JUSTICES.

houses already licensed, and all other circumstances bearing on the question, whether it is fit and proper, in the interest of the public, for whose benefit these Acts are passed, that an additional licence should be granted.

We cannot doubt, looking to the preamble and the provisions of 32 & 33 Vict. c. 27, that the object of the legislature was to subject future beerhouses to the same regulation, and to put them on the same footing in this respect as houses licensed under 9 Geo. 4. The language of the first part of the 8th section has been justly criticised in the argument, and it certainly is not the most appropriate which could have been used to express the intent of the legislature, but we think the meaning is made plain by the context. The latter part of the section says that, as regards certificates for the sale of beer *not* to be consumed on the premises, the 9 Geo. 4 shall be subject to this qualification, that no such certificate shall be refused, except upon the ground, first, that the applicant has failed to produce satisfactory evidence of good character; secondly, that his house is of a disorderly character; thirdly, that he had before forfeited or been adjudged disqualified for a licence; or, fourthly, that he or his house is not duly qualified. Again, the 19th section says, that where, on the 1st of May, 1869, a licence is in force with respect to any house for the sale by retail of beer to be consumed on the premises, it shall not be lawful to refuse an application for a certificate for the sale of beer to be consumed on the premises, except on one or more of the grounds upon which a licence to sell beer not to be consumed on the premises may be refused.

The necessary implication from these provisions is, that under the 9 Geo. 4, and also under the recent Act, in cases not within these two clauses (of which the present is one), the certificate may be refused, though the applicant is of good character, though his house is not disorderly, though he has not forfeited or been adjudged unworthy of a licence, and though he and his house are duly qualified.

The discretion of the justices in granting or withholding a certificate is therefore as large and unfettered under the one Act as under the other, and is in both cases unlimited, and should be governed by the same considerations.

1870

THE QUEEN v. LANCASHIRE JUSTICES.

For these reasons we are of opinion that the decision of the sessions was wrong, and that the mandamus should go.

Rule absolute. (1)

Attorney for appellant: *Craddock, for Birchall, Wilson, & Hulton, Preston.*

Attorney for respondents: *W. Hunt, for Hulton & Lister, Salford.*

THE WILTSHIRE IRON COMPANY, LIMITED, *v.* THE GREAT WESTERN RAILWAY COMPANY.

Nov. 18.

Company—Effect of Winding-up of Company—General Lien put an end to—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 163.

In 1864 an agreement was entered into between the plaintiffs, a joint-stock company, limited, and the defendants, a railway company, by which goods consigned to the plaintiffs were carried on a credit-account, one condition being that goods or waggons belonging to or sent by the plaintiffs should be subject to a general lien in favour of the defendants for all moneys due to them from the plaintiffs, to take effect at the option of the defendants at any time after the failure of payment of any sums appearing due on the credit-account, or in case of bankruptcy, insolvency, or stoppage of payment.

Coke had been carried for some time by the defendants for the plaintiffs under this agreement, and on the 19th of November, 1866, there was 2000*l.* due from the plaintiffs to the defendants on the account for carriage. On the 30th of October, 1866, a petition for winding up the plaintiffs' company was presented by a creditor, and notice given in the London Gazette, and on the 16th of November an order for winding up was made under the Companies Act, 1862. On the 19th of November an official liquidator was approved. The plaintiffs' business was still carried on, under the liquidator; and on the 20th of November coke consigned to the plaintiffs' company was put in trucks belonging to the plaintiffs on the defendants' line, and they detained them for three days, in exercise of their general lien. An action having been brought for this detention:—

Held, that the general lien of the defendants under the agreement was put an end to by the order for winding up the plaintiffs' company, at all events as to after-acquired property: as the exercise of such a right was contrary to the spirit and intention of the statute.

DECLARATION that plaintiffs delivered to defendants, as and being carriers of goods by railway from Cardiff to Seend, certain goods to wit, coke, to be by them carried from Cardiff to Seend, and there delivered for plaintiffs, within certain reasonable times in that behalf for reward to defendants in that behalf, and defendants

(1) See the preceding case.

At the trial a verdict was taken for the plaintiffs subject to a case to be settled by an arbitrator for the opinion of the Court.

The plaintiffs are a company which, in 1864, began to carry on the business of manufacturers of iron at Sweid, in the county of Wilts, under the name and style of the "Wiltshire Iron Company, Limited," and continued to do so until the winding up of the company, as hereinafter mentioned.

The Great Western Railway Company, the defendants, are the owners of the South Wales Railway, having a station at Cardiff, and of a short line of railway from Bath Junction to Devizes connected with their main line. This short line has a station at Sweid. Both these lines are subject to the provisions of the Railway Clauses Consolidation Act, 1845. The plaintiffs' works are connected with this line of railway at Sweid by a short tramway laid down at their own expense by the permission of the defendants.

The plaintiffs had entered into arrangements with various proprietors of collieries in Wales and Somerset for the supply of coke to enable them to carry on their manufacture of iron—in particular with Messrs. Hallway & Co., of Cardiff, and with the South Wales Coal Company at Newport. Both supplied the plaintiffs weekly with coke.

Messrs. Hallway & Co.'s colliery is situate at Tyrain, near Cardiff, South Wales. The coke was brought down to the plaintiffs' works by the Taff Vale Railway and the defendants' railway. The course of business was for the Taff Vale Railway Company to bring the coke to a depôt at Cardiff belonging to the defendants, where it was "shipped," or transferred, by the defendants' servants (no consignment of truck or goods here intervening) to the plaintiffs' canal trucks upon their arrival by the defendants to Sweid, and there sent over to the plaintiffs by being drawn on their tramway.

On each occasion of delivery of coke to defendants a consignment note in the form [M.], hereafter set out, was signed by Messrs. Hallway & Co. or an agent on their behalf, and all such consignments were subject to the terms and conditions of the agreement of the 13th of March, 1869.

The plaintiffs, for more than two years before the alleged wrongful act, on their application, had a ledger or credit account with the

[illegible]

1870

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

defendants according to the agreement of the 10th of March, 1864, of which the following are the material parts:—

"Great Western Railway.

"Conditions to be observed by persons having or desiring to have ledger or credit accounts with the Great Western Railway Company, and upon which the Great Western Railway Company permits such accounts to be opened in their books after satisfactory information as to the responsibility of such parties:

"1. On delivery of goods at any station for conveyance they shall be accompanied by a receiving note properly filled up and signed by the sender, setting forth the name and address of the consignee, the weight, number, description, and marks of the goods, and the requisite instructions for their disposal.

"2. An account of all charges due for the carriage of goods will be rendered monthly, and such account shall be discharged by payment in full of the exact sum shewn to be due in such account within seven days after the delivery of the same."

"5. Persons having ledger accounts shall be subject in respect of all matters connected with the transmission of goods, &c., to the established regulations of the company as to conditions of carriage, charges, risks, &c., which may from time to time be in existence."

"8. The goods or waggons belonging to or sent by a person having a ledger account shall be subject to a general lien in favour of the company for all moneys due to the company from each person on any account, to take effect at the option of the company at any time after failure of payment of any sums appearing due on the credit accounts, or, in case of bankruptcy, insolvency, or stoppage of payment, to take effect at any time for any sums appearing due in the books of the company.

(Indorsed.)

"To Mr. Grant, Goods Manager, Paddington.

"Sir,—I have to request that a credit account may be opened in favour of the Wiltshire Iron Company in the books of the Great Western Railway Company; and should that be granted, this company agree to abide by all the conditions foregoing.

(Signed) "Henry Sutcliffe,

"Secretary to the Wiltshire Iron Company, Limited,

"28, Poultry; March 10th, 1864.

"Station at which the account is required, Seend."

From July, 1865, to the time of the alleged neglect the balance appearing in the books of the defendants to be due, and in fact due, to the defendants was never less than 1000*l.*; and after that date, and down to the time of the alleged neglect, the plaintiffs had applied for time to pay, and had promised to make payments on account, but did not fulfil, and were unable to fulfil, such promises; and on one occasion, in the month of October, 1866, they gave the defendants a cheque on their (the plaintiffs') bankers in part payment, which cheque, on presentment, was dishonoured; and on the 29th of October, 1866, and thence down to the time of the alleged neglect, the balance, after failure of promises to pay, was more than 1000*l.*

The defendants, in exercise, as they contend, of the right given to them by the preceding facts in connection with the agreement for a ledger or credit account, dealt with the goods, the subject of this action, in the circumstances and for the time hereafter stated.

On the 30th of October, 1866, a petition was presented for the winding-up of the company by a creditor, and notice of the same was on that day given in the *London Gazette*, and on the 16th of November, 1866, an order for winding up the company was made by Stuart, V.C., under the Companies Act, 1862.

On the 19th of November, 1866, Mr. H. T. Edwards was approved of as official liquidator by the Chief Clerk. The defendants were then creditors for carriage of goods to the amount of over 2000*l.*, and have never been paid. They have since come in as creditors under such liquidation. Messrs. Hollway & Co. were also creditors to a large amount; and it being thought that the blast furnaces would fetch a better price if sold while in full blast, it was agreed at a private meeting of some of the principal creditors, held on the 19th of November, 1866, to continue the works. The defendants were not present at, and had no notice of, such meeting.

On the said 19th of November Mr. Steeds, on behalf of Hollway & Co., and the Vobster Coal Company in Somersetshire, being a partner in both firms, agreed to supply as much coke as was needed for the maintenance of the furnaces at Seend.

On the 20th of November there were on the Taff Vale Railway a number of trucks containing coke belonging to Messrs. Hollway & Co. Instructions were given on that day to place these trucks

1870

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

upon the Taff Vale Railway "tip." The tip is the stage by which coke is transferred from that railway to the line of the defendants at Cardiff. Their contents were transferred into the trucks of the plaintiffs, four of the latter having been completely filled on the 21st of November, six on the 22nd of November, and five on the 23rd of November, after 10.10 A.M. (the time of the departure of the usual mineral train) on each day. After being filled, these trucks were weighed at the weighing machine of the defendants, and consignment notes were then made out, and signed by the foreman of Messrs. Hollway & Co., who was authorized to do so. The three notes were in the following form:—

[B] Owner's risk at reduced rates.

To the Great Western Railway Company, *Newtown* Station, *Nov.* 21*st*, 1866.

Receive from *Hollway & Co.* of *Cardiff*, the undermentioned goods, subject to the conditions stated below.* To be sent to *Seend* Station.

To be carried at the special reduced charge below the company's ordinary rate, in consideration of the company being freed from risk, as mentioned below.*

Truck.	Consignee.		Goods.		Weight.	Paid on.	Paid.
	Name.	Address.	Description of Package.	Contents.	Tons. cwt.	£ s. d.	£ s. d.
8176					9 12		
74	*Wiltshire*				17 11		
8174	*Iron Co.*	*Seend.*	*Coke.*		9 6		
70					6 15		

Charges to be paid by *Consignee.* *Hollway & Co.* Sender.

* SPECIAL CONDITIONS.—The company do not undertake the duties of common carriers in respect of goods conveyed under this agreement. The company are not to be subject to any risk of loading, stowage, or unloading, nor to be answerable for loss or damage, actual or consequential, nor for discrepancy in the delivery as to either quantity, number, or weight, nor for the condition of articles so carried, nor for any consequences arising from over-carriage, detention, or delay in, or in relation to, the conveying or delivery of them, however caused.

For the general conditions on which the above goods are carried, see the other side.

[The third condition being]—All goods from whomsoever received, or to whomsoever belonging, shall be subject to a general lien of the company for any moneys that may be due to the company at the time by the owners or by the person who shall have delivered the same to the company; and if, after fourteen days' notice shall have been given to the consignors that such goods are detained for any claim of the company, the money due be not paid, the goods will, at the discretion of the company, be sold to defray the company's claims and all expenses incurred thereon.

1870

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

None of these trucks were despatched by the defendants until the 10.10 A.M. mineral train on the 24th of November, which was a Saturday. The trucks so filled on the 21st and 22nd were detained by the defendants until the said train of the 24th in exercise of the lien claimed by them.

The official liquidator applied to Stuart, V.C., at Chambers for leave to carry on the works, and, having obtained the necessary direction of the Chief Clerk, proceeded to do so; but no order appointing the official liquidator was drawn up until the 30th of November, 1866, in order to give him the opportunity of perfecting his recognizances.

On the 23rd of November the official liquidator sent the following letter to Messrs. Hollway & Co.:—

"I have received invoices 21st, 22nd, 23rd inst., but the coke has not yet arrived. I fear it has been detained by the railway company. In the future, please send it in my name as official liquidator of the company."

A copy of this letter was handed by Messrs. Hollway & Co. to the defendants' manager at Newport.

The official liquidator, on the 24th of November, sent a telegram from Seend to Mr. Stevens, the district manager of the defendants, residing at Reading, of which the following is a copy:—

"From the Official Liquidator of Wiltshire Iron Company to T. H. Stevens, Great Western Railway Company, Reading.

"Send me all the coke on your line for us at once. I guarantee payment of carriage. Telegraph to your station-master here that all is right."

On the same day the official liquidator wrote by post to Mr. Stevens the following letter:—"I understand that you have given instructions to your station-master at Seend to stop all coke from coming up to our works. I presume that you are aware that the company is winding up in the Court of Chancery, and that I have been appointed official liquidator. It is with the Vice-Chancellor's sanction that I am carrying on the works; and should you stop or detain any trucks belonging to me, you, of course, will be responsible. All accounts for carriage since the date of the winding-up order shall be paid by me. Should the furnaces go out of blast through your not forwarding the coke the consequence would be

1870

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

serious. I trust that on receipt of my telegram you gave instructions for the trucks containing coke sent off from Cardiff on the 21st, 22nd, and 23rd inst. to be forwarded at once. If not here first thing on Monday the furnaces must go out."

The fifteen trucks delivered to the defendants at Cardiff, not having been despatched thence until the 24th of November, arrived at Seend Station at 10.30 A.M. on Monday the 26th, and were allowed to pass into the plaintiffs' works.

All the said coke had been carried by the defendants to the plaintiffs' works at Seend at reduced rates according to the conditions appearing in the consignment note [B.]

For the purpose of the argument of the case it was to be taken that the plaintiffs sustained damage.

The Court were to have power to draw all necessary inferences, and to make any amendment that the judge at Nisi Prius ought to have made.

The questions for the opinion of the Court were:—1. Whether the facts stated prove a neglect to carry and deliver according to the charge in the declaration sufficient to entitle the plaintiffs to recover. 2. Whether such facts prove either of the special pleas. 3. Should the Court be of opinion that any such plea is proved, whether it is an answer to the declaration.

According to the opinion of the Court, judgment was to be entered; and if for the plaintiffs, the case was to be sent back to the arbitrator to assess the damages.

Bere, Q.C. (*Eyre Lloyd* with him), for the plaintiffs. The only real question in the case is, whether the agreement, by which a general lien for the balance of their carrying account was given to the defendants over all goods of the plaintiffs sent to be carried by the defendants, is not put an end to by the order for winding up the plaintiffs' company. The short facts are, the agreement was entered into on the 10th of March, 1864; the order for winding up was made on the 16th of November, 1866; the official liquidator was provisionally approved on the 19th of November; and on the 21st, 22nd, and 23rd of November, coke was delivered to the defendants by Messrs. Hollway, in pursuance of an arrangement that they would supply coke for the purposes of keeping in

1870

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

the blast-furnaces until the company's business was sold. A large sum for previous carriage of goods was then due to the defendants, but no goods had been carried since the winding-up order, and in the exercise of the right of general lien, the defendants detained the coke. Now when a company is being wound up under the Companies Act, 1862 (25 & 26 Vict. c. 89), by s. 153, all transactions between the commencement of the winding-up and the order are void. This transaction was after the order was made. By s. 158, debts, whether ascertained or otherwise, shall be admissible to proof against the company; and by rule 25 of the Chancery Rules of the 11th of November, 1862, all debts are to be estimated at their value at the date of the order for winding up. (1) Here the debt of the defendants against the plaintiffs' company was ascertained, and their only remedy was by proof, so that they might take pari passu with the other creditors, according to the scheme of the Act which is to put all creditors on the same footing. This is further carried out by s. 163, which enacts that when a company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the effects of the company after the commencement of the winding-up, shall be void to all intents. It is true that a lien is not mentioned, but it is clearly within the meaning of the Act. The effect of the winding-up order is to put a stop to all matters that lie in contract: *In re Wiltshire Iron Co.* (2), where Lord Cairns, L.J., says in effect, where any bonâ fide disposition of property of a company is incomplete before the time of the order for winding up, and rests only in contract, the Court has no discretionary power to order the contract to be fulfilled, and the person with whom the contract was entered into, —such as a vendor who has paid the purchase-money but not received the goods,—has only a general claim as a creditor for damages for the breach of contract. In *Ex parte Parry* (3), a creditor had obtained judgment against a company and put in an execution before the petition for winding up was filed, and the Court allowed the sale under the execution to proceed, but distinctly on the grounds that the creditor had put in force his

(1) See 32 L. J. (Ch.) 4. (2) Law Rep. 3 Ch. Ap. 443, 446.
(3) 33 L. J. (Ch.) 245.

1870

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

remedy by execution before the winding-up order was made, and, therefore, that neither s. 153 nor s. 163 applied.

[LUSH, J. The coke here was not the property of the company till after the winding-up.]

The goods, if they were ever the property of the company strictly, did not become so till after the winding-up order, and they also came into the defendants' possession after the order. It was found at a meeting of the creditors to be more beneficial to keep in the furnaces, so as to sell them in blast, and the coke was sent for this very purpose. The business of the company was only being carried on for the beneficial winding-up of the company, which the official liquidator had power to do under ss. 94, 95, and 96; and by s. 92, if the liquidator be not appointed, the property of the company shall be deemed to be in the custody of the Court. So that these goods, against which the defendants sought to exercise their general right of lien, cannot be said to be the goods of the company sui juris. In the case *In re Union Cement Co.* (1). it was held that a solicitor had no lien for his costs on the documents relating to the winding-up. And *In re Progress Insurance Co.* (2), is also in point, as shewing that where a business is carried on for the purpose of winding up, the ordinary relations do not exist between the company and a party dealing with them. Lastly, it should be observed that, as the defendants had not carried the goods, but detained them at the place of departure, in exercise of their right of general lien, they could not have any special lien for the carriage.

Lopes, Q.C. (with him, *J. Digby*), for the defendants. First, the defendants' general lien was not put an end to. Possibly the liquidator might have been able to determine the contract of 1864, if he had chosen; but this he did not do: on the contrary, he had the goods sent in the usual way under consignment notes, giving a general lien, and at the reduced rates. The property of the company is not vested in the liquidator, as in the case of bankruptcy in the assignees; but even had this been a case of bankruptcy the lien could not have been disturbed, In 1 Griffiths and Holmes' Bankruptcy, p. 320, it is said: "Property of a bankrupt subject to a lien follows the general rule, that is to say, the

(1) Law Rep. 4 Ch. Ap. 627. (2) Law Rep. 9 Eq. 370.

1870

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

property belonging to the bankrupt passes to his assignees, but without prejudice to the lien of the incumbrancer."

[HANNEN, J. That is, if there be an existing lien: the general lien had not attached to these goods before the winding-up.]

The liquidator, it is true, manages the company, but he does no more. Under s. 95 the company continues to exist until it is dissolved under s. 111, on the winding-up being completed. S. 79, which enacts under what various circumstances a company may be wound up, shews that it need not be insolvent: and according to the contention of the other side, the company has only to pass a resolution under s. 79 that it will be wound up, and then it will be able to escape at once from any burthensome contract. In *Re Agra and Masterman's Bank* (1) it was decided that a creditor's right of set-off—which is very much in the nature of a lien, enabling the creditor to get his whole debt, instead of only a rateable portion with the other creditors,—is not put an end to by a winding-up order; and WOOD, V.C., expressly points out that the common law rights of the parties are not interfered with. If the liquidator chooses to continue the contracts of the company, all the incidents of the contracts remain: *In re London and Colonial Company* (2), and *In re English Joint Stock Bank.* (3) Secondly, there was a general lien given by the consignment notes, the conditions being that goods shall be subject to a general lien if carried at the reduced rates, and these goods were to be so carried.

[MELLOR, J. At the time these goods were sent there had been no other goods carried since the winding-up.]

It comes back really to the question, did the winding-up put an end to the general lien under the old agreement? The cases cited shew it did not. Lastly, the official liquidator was not appointed till the 30th of November, and the defendants had no notice of the winding-up, so that these goods must clearly be taken to have been sent to and received by the defendants under the old agreement.

Bere, Q.C., in reply. The winding-up order was advertised, and that is notice to all the world, and puts an end to all existing contracts: *Chapman's Case.* (4) The petition is the commencement of

(1) Law Rep. 2 Eq. 674.
(2) Law Rep. 7 Eq. 550.
(3) Law Rep. 3 Eq. 341.
(4) Law Rep. 1 Eq. 346.

1870

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

the winding-up by s. 84: *United Ports Insurance Company.* (1) There is nothing in the objection that the official liquidator was not appointed until his formal appointment on the 30th of November; assuming that to be so, the winding-up order was made on the 16th of November, and by s. 92, on the commencement of the winding-up the property of the company is to be taken to be in the custody of the court if there is no liquidator. Lastly, if it makes any difference, this was not a voluntary winding-up, but the company was proved, under s. 80, to be unable to pay its debts.

MELLOR, J. We are of opinion that our judgment must be for the plaintiffs. The action is brought against the defendants for not delivering certain goods, which it was alleged they had undertaken to carry. The defence set up is this: "We had a right to detain these goods under an agreement by which we had a general lien." On the other hand it is said, whatever might have been the effect of that agreement before the order for winding up was made, no such effect can now be given to it, because it would be to allow a previous agreement to control the further carrying on of the business under circumstances and at a time when, in point of fact, the management was no longer in the plaintiffs' own power. The effect of the winding-up seems to be, that from that moment there is a quasi bankruptcy. The property becomes no longer the company's, it is rather in the hands of the creditors; and the effect of it is, that there can be no general lien against goods that have come into the hands of the company after the date of the order for winding up. That seems to be the turning point. These goods became the property of the company after the date of the order for winding up, and they were sent to the defendants after that to be carried to the plaintiffs. The defendants detained them, and it is only on the guarantee of the official liquidator, that he will pay the special charges for the carriage, that the defendants forward them. It seems to me, under these circumstances, they could not be justified in holding under a lien which might have been valid, and would have afforded a good excuse anterior to the winding-up.

LUSH, J. I am of the same opinion. The order for winding up

(1) 39 L. J. (Ch.) 146.

1870

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

was made on the 16th of November, and on the 19th of November the creditors agree amongst themselves that it will be better to keep the blast furnaces going, in order to sell the business, which the plaintiffs' company had been carrying on, to greater advantage, and the coke in question was sent by one of the creditors to the works in pursuance of that resolution, in order to supply the blast furnaces. The coke came into the hands of the railway company as carriers for the purpose of carriage, and they failed to deliver it in a given time, a time long enough to make them, as admitted in the case, liable to an action for breach of contract, unless they can justify the detention; and they seek to justify it on the ground that by a previous agreement with the Wiltshire Iron Company, made at the time the company were sui juris, they had a right to keep the coke for a large debt due from that company to them. Can they justify doing that under the circumstances? It must be observed that this was coke which never belonged to the iron company at the time they were carrying on business sui juris, and that it came into the possession of the railway company after the order for winding up in pursuance of an arrangement between the creditors. It appears to me that, under the circumstances, by necessary implication from the provisions of the Act, this setting up of such a general lien would be a violation of the spirit of the Act.

It appears this company was wound up on the petition of the creditors, and therefore must be presumed to be in a state of insolvency. Then the statute says when an order for winding up has been made an official liquidator shall be appointed, and the official liquidator shall carry on the business of the company so far as may be necessary for the beneficial winding-up of the estate. He shall sell all the personal property and effects of the company, and do all acts necessary for the purpose of winding up and distributing the estate amongst the creditors; and in order to enable him more effectually to do so, s. 153 says, "All dispositions of the property, effects, and things in action of the company, and every transfer of shares or alteration in the status of the members of the company made between the commencement of the winding-up and the order for winding up shall, unless the Court otherwise orders, be void." A fortiori all dispositions by the company after

1870

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

the order for winding up would be void. And, furthermore, the statute says in s. 163, "Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." Therefore, clearly the intention of the legislature was to suspend the power of the company, which is in process of being wound up, after the commencement of the winding-up, and to transfer the management of the affairs to the liquidator, in order to sell and distribute the assets amongst the creditors.

Now, one creditor could not, by virtue of an agreement made before the winding-up, lay hold on goods that came into the hands of the liquidator after the order, and pay himself. The statute intends that all the creditors shall partake of the assets rateably. I think, therefore, although there is nothing expressed in the statute, the inference is clear that the railway company could not by virtue of that agreement claim to set up a lien against these goods. If these goods had been in the company's disposition prior to the winding-up, the winding-up would not disturb the lien, but, after the order for winding up the case is entirely altered. It is clear the Wiltshire Iron Company could not have made the agreement after that time; and if it had been expressed in the agreement itself, that, in the event of an order for winding up, the railway company might lay hold of property in their hands and pay themselves in full, it is clear that such a condition would have been void as being in contravention of the statute. The railway company are attempting to act as if that term was in the agreement, namely, by virtue of the agreement made with the company while dealing with its own property, they seek to appropriate the property at a time when the company have lost all power over it. Therefore, I am of opinion the pleas are not made out, and our judgment should be for the plaintiffs.

HANNEN, J., concurred.

Judgment for the plaintiffs.

Attorney for plaintiffs: *Pulbrook.*
Attorneys for defendants: *Young, Maples, & Co.*

JONES AND ANOTHER *v.* THE PRESIDENT AND SCHOLARS OF ST. JOHN'S COLLEGE, OXFORD.

1870
Nov. 18.

Building Contract, Construction of—Clause as to Penalties for Delay—Clause of Reference to Arbitration—Clause as to order or decision of Clerk of Works—Party taking advantage of his own Wrong.

Declaration: That by an agreement between plaintiff and defendant plaintiff agreed to build and complete by a day named certain specified works, subject to alterations or additions which might be made, as mentioned in the agreement, and if plaintiff failed to complete by the day named, he should pay to defendant, as liquidated damages, 3*l.* for every day until the completion of the works, and defendant might deduct such sum from any money due from him to plaintiff, or obtain payment of it in any way he might think fit. It was also agreed that the balance of the sum agreed (2340*l.*) should be paid on completion of the works, when the inspector should have given his final certificate of approval; it was also agreed that the decision of the inspector, with respect to the quality and state of works executed, and to the time within which they should have been executed, should be final and without appeal; and that any dispute between plaintiff and defendant as to the value of any alteration or addition, or concerning the true construction of the contract, or any matter relating thereto, the mode of deciding which was not otherwise expressly provided for, should be left to the determination and award of the inspector, who might give a certificate instead of an award. That the plaintiff completed the works and the inspector gave his final certificate, and that certain disputes arose as to what further sum was due to plaintiff beyond the 2340*l.*, and the disputes were referred to the inspector, who certified that 990*l.* was the balance due to plaintiff. Breach, non-payment of such sum.

Plea: That the disputes above mentioned were as to the value of certain additions, and not as to the time within which the works should have been executed, and that the question as to time was not in dispute before the inspector. That plaintiff did not complete the works on the day named, and was liable to pay to defendant 873*l.*, being liquidated damages at the rate of 3*l.* for every day from the day named to the day of completion; and defendant is entitled to deduct that sum from the 990*l.* Payment of the 117*l.* balance into court.

Replications: 2. That defendant ordered additions and alterations which were so mixed up with the original works that it was impossible for plaintiff to complete them on the day named, nor until the additions and alterations were completed, as defendant well knew when he gave the order. 4. That there is, and always has been, a dispute as to the time in which such works ought to have been and were completed, and as to the right of defendant to be paid the sum of 873*l.* mentioned in the plea, or any part thereof, and such dispute has not been determined by the inspector, as in the agreement provided.

Rejoinder: That by the agreement it was agreed that plaintiff should do no extra works without an order signed by the clerk of works, and countersigned by the bursar; and in the event of any alteration or addition being executed under such order, the plaintiff should execute and complete the works contracted for,

1870

JONES v. ST. JOHN'S COLLEGE.

with such alterations and additions, in the same manner as if they had been originally comprised in the works of the contract, and the period for completing the entire works should not exceed the period limited for completion of the original works, unless an extension of time be also allowed by order signed and countersigned as aforesaid. That no extension of time was so given.

The plaintiff demurred to the plea and rejoinder, and the defendant demurred to the 4th replication:—

Held, 1. That the plea was good, and the fourth replication bad: for that the certificate of the inspector was not a condition precedent to the defendant's right to the 3*l.* per day; nor did the clause as to referring the matter to the inspector exclude the right to bring an action, as there were no excluding words in the clause. 2. That the rejoinder was good: for that, having expressly agreed to do the entire works, if extra work were ordered by the clerk and bursar, within the time originally limited, unless they ordered an extension of the time, the plaintiff was bound by their decision, although it might involve an impossibility.

DECLARATION, that by an agreement in writing made between plaintiffs and defendants, dated the 14th of September, 1867, it was agreed that plaintiffs should, before the 1st of December, 1867, roof in, and, before the 15th of May, 1868, erect, build, and completely cover in and finish, according to certain specifications, plans, elevations, and sections, certain homestead, farmhouse, and buildings, but subject to certain extras, alterations, or additions which might be made as in the agreement mentioned. And it was further agreed that the time mentioned in the agreement for the completion of the works should be of the essence of the contract, so that if plaintiffs should not, on the 1st of December, 1867, roof in, and, on the 15th of May, 1868, complete and make fit and ready for occupation respectively the said works, plaintiffs should pay to defendants, as and for liquidated damages, the sum of 3*l.* for every day from and after the 1st of December, 1867, and 15th of May, 1868, respectively, until such day as the said works should be roofed in and completed respectively, and defendants might deduct such sum of 3*l.* per day from any moneys which might be due at any time from defendants to plaintiffs, or obtain payment of the same in any way they might think fit. And it was also agreed that defendants should pay to plaintiffs the sum of 2340*l.*, as the gross sum to be paid for the completion of the works at the rate of 50*l.* per cent. from time to time during the works on the value of the works done, on such value having been first certified by the clerk of the works in writing, but no payment to be less

1870

JONES v. ST. JOHN'S COLLEGE.

than 100*l.* at any one time, and at the rate of certain other percentages until the inspector should have given his final certificate of completion of the works of the contract to his satisfaction, and then defendants should pay to plaintiffs the whole contract price, less 5*l.* per cent. thereon, and the remaining 5*l.* per cent. at the end of three calendar months after the date of such final certificate. And it was also further agreed that defendants should pay to plaintiffs the value of any addition, alteration, or deviation causing an increase of cost which might be executed by plaintiffs under the agreement, and according to the terms thereof, in the same manner as the 2340*l.* And it was also further agreed that the decision of the inspector with respect to the quantity, state, and condition of any works actually executed under the contract, and to the time within which they should have been executed, and as to the nature or quality of the materials, or to the execution of the works, should be final and without appeal; and that if any dispute or difference should arise between defendants and plaintiffs as to the value of any alteration, addition, deduction, or deviation, or touching or concerning the true construction of the contract, or of all or any of the plans, elevations, or sections, or the specification, or touching or concerning any matter or thing whatsoever relating thereto, or to the execution thereof respectively, and the mode of deciding which was not otherwise expressly provided for, it should be left to the determination and award of the inspector. That after the making of the agreement, and before any breach thereof, it was agreed in writing by plaintiffs and defendants that the inspector should be at liberty to give his certificate in lieu of making an award, and that such certificate should have the same force and effect as an award in writing. And plaintiffs, in pursuance of the agreement, erected, built, and completely covered in the homestead, farmhouse, and buildings; and the inspector in the agreement mentioned, pursuant to the terms of the agreement, gave his final certificate of completion of the works of the contract to his satisfaction, and three calendar months elapsed after the date of such final certificate, and defendants had paid to the plaintiffs the sum of 2000*l.* for and on account of the works; and after the making of such final certificate, and after the elapsing of the three calendar months from the date of the certificate, and after

1870

JONES v. ST. JOHN'S COLLEGE.

the payment of the 2000*l.*, certain differences and disputes arose between plaintiffs and defendants as to whether any, and, if any, what further or other sum of money over and above the 2000*l.* was due and payable by defendants to plaintiffs by reason of the works, and pursuant to the agreement upon the balance of accounts between them. And thereupon plaintiffs and defendants referred the differences and disputes, according to the true intent and meaning of the agreements, to the determination of W. H. Homfray, then being the inspector in the agreements mentioned; and Homfray took upon himself the reference, and having heard plaintiffs and defendants, and considered the evidence, did duly make and publish his certificate in writing, and certified that he found a gross balance coming to plaintiffs from defendants of 2990*l.* 1*s.* 1*d.*; but from such amount was and is to be deducted the sum of 2000*l.* paid on account. Averments of all conditions precedent. Breach, the non-payment of the balance of 990*l.* 1*s.* 1*d.*

Plea: That the differences and disputes in the declaration alleged to have arisen between plaintiffs and defendants, and to have been referred to the determination of Homfray, and in respect whereof he certified as therein mentioned, were merely as to the value of certain additions made by plaintiffs to the works specified in the agreement, and not as to the time within which the works should have been or were executed, and that the question of time was not in dispute or difference before Homfray; and that plaintiffs did not on the 1st of December, 1867, roof in, or, on the 15th of May, 1868, complete and make fit and ready for occupation the works according to the agreement; and plaintiffs thereby became and are liable to pay to defendants the sum of 873*l.*, being liquidated damages, at the rate of 3*l.* for every day from and after the 1st of December and 15th of May respectively, until such day as the works were roofed in and completed respectively; and the defendants were and are entitled to deduct the same from plaintiffs' claim of 990*l.* 1*s.* 1*d.* awarded to them by Homfray, and they have deducted the same accordingly. Payment into court of the balance of 117*l.* 11*s.*

Replications: 2. That plaintiffs were always ready and willing to make and execute the works in the agreement mentioned, and to

cover in and complete and make fit and ready for occupation respectively the works according to the terms, and in the manner and at the respective times in the agreement mentioned, and would have made and executed, covered in and completed, and made fit for occupation the same accordingly, but that defendants, during the progress of the works, in pursuance of the agreement, and whilst plaintiffs were making and executing the same according to the terms of the agreement, made certain additions to, and alterations of, and deviations from, the works in the agreement mentioned, and directed plaintiffs to execute the same, which plaintiffs accordingly did; and such additions, alterations, and deviations were so mixed up with the works to be made and executed in pursuance of the agreement, that it was impossible for plaintiffs, on or before the 1st of December, 1867, to roof in, and on or before the 15th of May, 1868, to complete and make fit and ready for occupation respectively the works to be executed under the agreement, nor until the additions, alterations, and deviations were also completed, as defendants, at the time of the making of the additions, alterations, and deviations, and directing plaintiffs to execute the same, and always, well knew; and plaintiffs made and executed and roofed in, and completed and made fit and ready for habitation respectively the additions, alterations, and deviations, and the works to be made and executed in pursuance of the agreement within a reasonable time. And that, using all due and reasonable dispatch, it was by reason of the premises in this pleading impossible to have the works roofed in and completed and made fit and ready for occupation at the respective times, and as in the agreement mentioned, and that plaintiffs failed so to do by reason of the premises in this pleading.

3. That plaintiffs were prevented and hindered from, and delayed in making and executing the roofing in, completing, and making fit and ready for occupation respectively the works in pursuance of the agreement at the times and in manner therein mentioned, by the acts, neglect, and default of defendants and their servants, and not otherwise.

4. That there has always been, and still is, a dispute and difference between plaintiffs and defendants as to the time within which the works in the agreement mentioned should have been and were

1870

JONES v. ST. JOHN'S COLLEGE.

roofed in and completed and made fit and ready for occupation respectively; and as to the right and title of defendants to be paid the said sum in the plea mentioned, or any part thereof, or any of the sums of 3*l.* per day, or any part thereof, or to deduct the same from plaintiffs' claim, as in the plea mentioned, and such dispute or difference never has been settled or determined by the inspector, as in the agreement provided for.

Rejoinders: 2. To 2nd replication, that by the said agreement it was agreed:

"That the contractors shall not (subject to the provisions hereinafter contained for works under a clerk of works and bursar's alteration-order) make or allow any alteration or addition to, or deduction from, the works of the contract, or any deviation from the specifications, plans, elevations, or sections, which shall cause additional cost to the college beyond the said sum of 2340*l.* herein agreed to be paid, unless an order in writing, signed by clerk of works, and countersigned by the bursar of the college, shall have been previously delivered, before the commencement of any such alteration, addition, or deduction, to the said contractors, or left at their usual or last known place of abode, or at their office at the works, particularly specifying the alteration, addition, or deduction as aforesaid, which the college shall desire to make or be willing to allow, and by such order direct to be made or allowed, such order is hereinafter styled an alteration-order. . . . And further, that in the event of any such alteration, addition, deduction, or deviation being directed to be made, omitted, executed, or allowed by an order signed and countersigned as aforesaid, then, and in every such case, the contractors shall and will duly execute and complete the works hereby contracted for, with such alterations, additions, deductions, or deviations respectively as shall be respectively directed by every and any such alteration-order, in the same manner and subject to the same conditions, stipulations, and provisions to all intents and purposes, as if such alteration, addition, deduction, or deviation directed by any such order had been originally comprised in the works of the contract, and in the specification hereunder written, and the plans, elevations, and sections so signed as aforesaid. And further, that the period or periods for completing all such alterations or extra works shall not exceed the period limited by these presents for the completion of the works hereby contracted for, unless an extension of time be also allowed by order specifying the limit of extension, signed by the clerk of the works and bursar, within twenty-one days after the delivery of the alteration-order; no such alteration, addition, deduction, change, or deviation, shall in any way exonerate the contractors from the specific performance in every respect, of all the works of the contract within the time named in their contract, nor shall vacate their contract, or in any way affect the same; and no such alteration-order or time-order shall in any way affect the validity, or force, or operation of this contract, except so far as shall be specified or directed by such order."

Averment, that no extension of time was allowed by the clerk of the works and bursar, or either of them, nor was any extension of time obtained by or on behalf of plaintiffs, according to the agree-

ment, for any of the additions, alterations, or deviations in the 2nd replication mentioned.

3. To 3rd replication, that the acts, neglect, and default of the defendants therein mentioned, are the additions, alterations, and deviations directed by defendants to be made as in the 2nd replication mentioned; and that it was agreed by the agreement, as in the 2nd rejoinder mentioned; and the defendants repeat here the statements in the 2nd rejoinder.

Demurrers to the plea, to the 4th replication, and to the rejoinders.

Manisty, Q.C. (*J. O. Griffits* with him), for the plaintiffs. The plea is bad; the penalties, being applicable to several contingencies, cannot be liquidated damages: *Kemble* v. *Farren* (1). But, assuming the penalties to be liquidated damages, and so the subject of a set-off, the defendants are not in a position to set them off until the inspector has certified how many days delay ought to be allowed against the plaintiffs. Secondly, assuming the plea good, it is answered by the second replication. The defendants cannot take advantage of their own wrong, and order what is impossible of performance, and then recover penalties for the non-performance. *Holme* v. *Guppy* (2), *Westwood* v. *Secretary of State for India* (3), and *Russell* v. *Bandeira* (4) are directly in point for the plaintiffs. It is not stated when the orders for the extras were given. Suppose the day before the time for the completion of the works an order for alterations had been given, can it be said that the plaintiffs would still have been bound to complete the works on the day specified, and that the defendants would be entitled to claim penalties for the consequence of their own wrong? So *Roberts* v. *Bury Commissioners* (5), in the Exchequer Chamber, shews that if the delay took place by the wrongful act of the other party, that party cannot take advantage of the delay.

Kemplay (*Traill* with him), for the defendants. The plea is good: it is expressly stipulated in the contract that the 3*l.* a day may be deducted as liquidated damages due to the defendants for

(1) 4 Bing. 141.
(2) 3 M. & W. 387.
(3) 11 W. R. 261; 7 L. T. (N.S.) 736; 1 N. R. 262.
(4) 13 C. B. (N.S.) 149; 32 L. J. (C.P.) 68.
(5) Law Rep. 4 C. P. 755; Law Rep. 5 C. P. 310.

1870

JONES v. ST. JOHN'S COLLEGE.

two specific things; *Kemble* v. *Farren* (1), therefore, does not apply; and the defendants may obtain payment in any way they think fit; and even without such a clause, penalties expressed to be liquidated damages might have been set off: *Duckworth* v. *Alison* (2), *Fletcher* v. *Dyche.* (3) It is not made a condition precedent that the defendants should obtain the certificate of the inspector. Secondly, it is not denied that the second replication is good; it raises primâ facie a defence, but it is displaced by the second rejoinder; and that disposes of *Westwood* v. *Secretary of State for India* (4), for there the pleadings were similar to the present up to the replication; but there was no rejoinder setting out a special clause, like that in the present agreement. If builders choose to leave the matter in the hands of particular persons, such as a clerk of works, they must be bound by his decision, if bonâ fide, although it may be erroneous in point of fact, or involve the doing of an impossibility. *Roberts* v. *Bury Commissioners* (5) is no authority against the defendants. Here there was no wrongful act on the part of the defendants or the clerk of works or bursar, as there was on the part of the defendants and their architect in that case. The clerk of the works and bursar gave orders for alterations as authorized by the agreement, but they did not extend the time, and the plaintiffs were bound by their decision, however erroneous. The judgment of the Exchequer Chamber is therefore in favour of the defendants on this point, for that Court agreed with the Common Pleas that the third replication was bad, which set up that the architect's decision was wrong in not granting an extension of time, and consequently not conclusive.

Manisty, Q.C., in reply. If a man knowingly bind himself to do impossibilities, he cannot set up the impossibility. But here the plaintiffs cannot tell what the orders for extras may be; and it must be implied, therefore, in the clauses as to extras, that the orders will not be unreasonable, and that the defendants will not knowingly give an order which cannot possibly be performed within the time.

(1) 6 Bing. 141.
(2) 1 M. & W. 412.
(3) 2 T. R. 32.
(4) 11 W. R. 261; 7 L. T. (N.S.) 736; 1 N. R. 262.
(5) Law Rep. 4 C. P. 755; Law Rep. 5 C. P. 310.

1870

JONES v. ST. JOHN'S COLLEGE.

MELLOR, J. I am of opinion that our judgment must be for the defendants, who set up the deductions in respect of what may be called penalties. This is a contract to build certain works within a certain time; but it provides that certain alterations may be made, and the plaintiffs undertake not only to do by a given time the works which were specified, and which they had the opportunity therefore of forming their own judgment upon, but they also undertake to do the alterations, that is to say, such alterations as are contemplated by the contract, within the time originally prescribed for the performance of the works. We have the contract set out upon the record, and it appears there is express provision made by that contract for an extension of time in case the clerk of the works shall consider it necessary; but the contractors contract positively and absolutely to do the work and the alterations within the given time, unless an extension be made under that particular stipulation. That is a stipulation which expressly provides for that as to which Mr. Manisty says there is the implied condition. It appears to me that, in the face of that stipulation, we cannot imply a condition that is at variance with it. Mr. Manisty concedes that in general, where the works are specific, and the contractor can form his estimate upon them, however absurd his contract may be, for instance, if he undertook to build some great work within a year, which it is utterly impossible he could do, still, as he had the power of measuring and knowing the nature of the work, and understanding and forming a judgment upon his capacity to do it, he cannot excuse himself by saying it was impossible to do it in the time. But then Mr. Manisty contends, when a contract provides for alterations to be prescribed by the other party, that it is impossible for a man so to bind himself as to exclude him from the benefit of the implied condition, that the order should be such as could be completed within the time. But, as I have said, I do not think we can imply this.

I think the cases chiefly relied upon are no authorities for the plaintiffs. *Westwood* v. *Secretary of State for India* (1) did not raise this question, as the record did not shew that the plaintiff had undertaken to do the alterations within the original time; and the judgment must be taken with reference to the circumstances as

(1) 11 W. R. 261; 7 L. T. (N.S.) 736; 1 N. R. 262.

1870

JONES v. ST. JOHN'S COLLEGE.

appearing on the pleadings. In *Roberts* v. *Bury Commissioners* (1) it is undoubtedly shewn by the judgment of my Brother Blackburn and myself, that if people will bind themselves to absurd regulations or to matters that appear impossible to be performed within the time, they must take the consequences of it; and therefore, if you make such a bargain, it is clear you cannot imply a condition which appears inconsistent with it. Therefore, so far as the authority of the cases go, they do not support Mr. Manisty's argument. Impossibilities may be of various sorts. It is admitted on these pleadings that the alterations were such as were contemplated by the contract, and I do not say (at present it is unnecessary to express any opinion) what might have been the result had the allegation been that the orders were given at such a time as that it was impossible to perform them within the limited time. The defence is not that. It is this: you gave orders for certain works to be done contemplated by the contract, and it was impossible for me to do them within the time. It is remarkable in how many of these contracts, which certainly seem one-sided, one party puts himself in the power of another; but people are content to enter upon works and contracts of this description, because they rely that the person named will not give them orders that they cannot do. In the present case the rejoinder sets out what the contract is, and there can be no such implication as that which Mr. Manisty relies upon, there being an express provision with reference to what he says is matter to be implied. Therefore, upon these grounds, it appears to me that our judgment must be for the defendants.

LUSH, J. I am entirely of the same opinion. Nothing can be more clear or explicit than the contract into which the plaintiffs chose to enter, and by that contract they must be bound. We cannot relieve them from it because it happens to operate hardly upon them. We have only to ascertain what the contract is. By the contract, they engaged to erect certain farm buildings, which are specified, according to plans and specifications furnished to them, together with any alterations or additions within specific limits, which the defendants might prescribe; and they engaged

(1) Law Rep. 5 C. P. at p. 325.

1870

JONES v. ST. JOHN'S COLLEGE.

that they would roof in the premises before the 1st of December, and completely finish them before the 15th of May, or that they would pay a penalty of 3*l.* for every day from and after the 1st of December, during which the premises were unroofed, and from the 15th of May, during which they were left unfinished, and the claim against them is for penalties for a certain number of days for not having roofed them in on or before the 1st of December, and for not having completed them on or before the 15th of May. Now, what is the answer? It is admitted the plaintiffs did not complete them by the time specified, but then they say that the alterations ordered by the defendants were so mixed up with the works to be executed in pursuance of the agreement, that it became impossible for them to complete the work by the time. That cannot be an answer under the contract, when it is shewn by the rejoinder that they expressly agreed in these terms, that "in the event of any such alteration being directed to be made, then the contractors shall duly execute and complete the works hereby contracted for, with such alterations and additions, in the same manner, and subject to the same conditions and stipulations, to all intents and purposes as if such alterations and additions had been originally comprised within the words of the contract; and further, that the period for the completion of such alterations or additional work shall not exceed the period limited by these presents for the completion of the works hereby contracted for, unless an extension of time be also allowed by order specifying the limit of extension." No extension of time was allowed, and the contract, therefore, is: "We undertake to erect these buildings, and any alterations you may order us to make, and we will roof them in by the 1st of December, and we will completely finish them by the 15th of May." What is there to excuse them from the penalties they agreed to pay if that was not done? If alterations were ordered that were not contemplated by the agreement, or if the order had come at an improper time, when it was not reasonable, it might be a different affair. That is not suggested. All the plaintiffs say is: "We found the alterations so mixed up with the general work that it was impossible to complete them within the time." The answer is: "You have undertaken to do it, so you must do it, or you must pay the penalty." Mr. Manisty contends there is an implied con-

1870

JONES v. ST. JOHN'S COLLEGE.

dition in a case like this, that if works are found to be impossible, the contractor shall be relieved from the burthen of them, although they were such works as both parties had in their minds at the time the contract was made. It is impossible to give effect to such a proposition as that. No stipulation can be implied in any contract which is at variance with the express terms of the contract. Whatever persons bind themselves to do under a penalty, that they must do or pay the penalty.

When one comes to understand the case of *Westwood* v. *Secretary of State for India* (1), it is no authority for the plaintiffs in this case, because there the pleadings stopped short at the replication; there was no rejoinder; and it did not appear that the plaintiff had contracted to do what the plaintiffs contracted to do here, namely, to execute the work with the alterations in the prescribed time. Therefore, all the Court decided was, that the replication, which shewed that the plaintiff was prevented from doing the work, by the nature of the alterations ordered by the defendant, was a very good answer; but that answer is entirely displaced here by the rejoinder, which shews that the plaintiffs expressly had this in contemplation at the time the contract was made, and agreed they would do whatever alterations the defendants might order within the original time specified, unless the clerk of the works gave further time. That case, therefore, is entirely distinguishable; and as to the other case of *Roberts* v. *Bury Commissioners* (2), for the reasons given by my Brother Mellor and Mr. Kemplay, it appears to have no bearing in favour of the plaintiffs. Therefore, I am of opinion that the replication is met by the rejoinder, and our judgment ought to be for the defendants.

HANNEN, J. I am of the same opinion. The plea, as was pointed out in the course of the argument, is good, because the aggregate of the sums of 3*l.*, which are set off, is liquidated damages; and the agreement to refer, which is relied on in the replication, and was set out in the declaration, does not oust the jurisdiction of this court, inasmuch as there are no excluding words in it. It is an ordinary agreement of reference. Then the

(1) 11 W. R. 261; 7 L. T. (N.S.) 736; 1 N. R. 262.

(2) Law Rep. 4 C. P. 755; Law Rep. 5 C. P. 310.

second replication admits that the orders which were given by the defendants were given by them in pursuance of the agreement; but it goes on to allege that they were impossible to be performed, and the defendants knew it. The effect of the rejoinder is to say, "True it is that the orders so given were impossible of performance within the time, but you bound yourselves under a penalty to perform within a certain time even impossibilities, if certain named persons whose judgment is relied upon should require it to be done."

Undoubtedly, it may be an unusual or an unwise contract to enter into, but there is no reason why a man should not enter into such a contract. Certainly, if he does in direct terms enter into a contract to perform an impossibility, subject to a penalty, he will not be excused because it is an impossibility; so if he does bind himself to perform an impossibility, if a certain named person shall require him to do so, there is nothing illegal in putting himself under such an obligation as that; and the question is, whether or not the contract, as set out in the rejoinder, shews that the plaintiffs did in effect so bind themselves. With regard to the language of that contract, I must say it seems to be impossible for the English language to supply words by which a man can so bind himself, if this contract does not. It is perfectly plain that the intention was to rely on the fairness, as well as on the skill and judgment of the person who was the clerk of the works, checked as he would be by a responsible person, namely, the bursar of the college. It was intended to rely on their fairness and judgment; and I can see nothing unreasonable in men so agreeing to be bound by the fairness and judgment of others. Therefore, unless we are obliged to hold that a man could under no circumstances so bind himself, I should be compelled to come to the conclusion I have arrived at, that the contract does so bind the plaintiffs; and for these reasons I agree in the judgment of the rest of the Court.

PER CURIAM,

Judgment for the defendants on all the demurrers.

Attorney for plaintiffs: *C. Mallam, for T. & G. Mallam, Oxford.*

Attorney for defendants: *John Philpot, for Morrell & Son, Oxford.*

1870
Nov. 16.

JARROW LOCAL BOARD OF HEALTH, APPELLANTS;
KENNEDY, RESPONDENT.

Public Health Act, 1848 (11 *&* 12 *Vict. c.* 63), *s.* 69—*Local Government Act*, 1858 (21 *&* 22 *Vict. c.* 98), *s.* 63—*On information for not paying Apportionment, proof of Preliminary Notice necessary.*

On an information against K. for not paying certain expenses apportioned upon him as owner of premises in a street upon which work had been done by the appellants, under s. 69 of 11 & 12 Vict. c. 63, it was proved that the work had been done, and an apportionment of the expenses made, and notice of it served upon the respondent, who had not given notice within three months that he disputed it, under 21 & 22 Vict. c. 98, s. 63; but no evidence was given of any notice having been served under 11 & 12 Vict. c. 63, s. 69, previous to the appellants' doing the work:—

Held, that the justices could not make an order unless the preliminary notice were proved to have been given.

CASE stated by justices of the county of Durham under 20 & 21 Vict. c. 43.

On the 2nd of May, 1870, a complaint was laid on behalf of the appellants, the local board of health for the district of Jarrow, against the respondent for not having paid 11*l.* 15*s.*, due from him as owner of premises in Ormonde Street, Jarrow, in respect of expenses incurred by the appellants in that street.

At the hearing, it was proved that the complaint was laid under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 69, (1) and other sections, to recover a portion of the expenses incurred by the appellants levelling, paving, &c., Ormonde Street, in respect of that part of the street abutting on the respondent's premises.

(1) 11 & 12 Vict. c. 63, s. 69: "In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, &c., to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining or abutting upon such parts thereof as may require to be sewered, &c., require them to sewer, &c., the same within a time to be specified in such notice; and if such notice be not complied with, the local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration . . . and such expenses may be recovered from the last-mentioned owners in a summary manner. . . ."

1870

JARROW LOCAL BOARD v. KENNEDY.

There was no evidence before the justices that any notice requiring the respondent to level, pave, &c., the street within a time specified by the notice had been served on the respondent; but the work had been done by the appellants, and an apportionment duly made, and notice of it served on the respondent; and he had not within three months after such notice given notice that he disputed it (1).

The respondent contended that he was not liable to pay any portion of the expenses claimed, upon the ground, inter alia, that Ormonde Street was a highway, and that the justices ought therefore not to make any order upon him; and also on the ground that there was no evidence of the preliminary notice having been given to him.

The justices dismissed the information; the ground of their decision being that it was incumbent on the appellants to prove before the justices that the preliminary notice had been given to the respondent; but if that notice had been proved, they were of opinion that the notice of apportionment would have precluded the respondent from setting up that the street was a highway.

Greenhow, for the appellants, contended that the justices were precluded from entering into the question of highway, and also as to whether the preliminary notice had been given. He relied on 21 & 22 Vict. c. 98, s. 63 (2), and cited *Reg.* v. *Livesey*. (2)

(1) 21 & 22 Vict. c. 98 (Local Government Act, 1858), s. 63: "Notwithstanding anything in the [Public Health Act contained, in all cases where by such Act the local board shall have incurred expenses, for the repayment whereof the owners of the premises for or in respect of which the same are incurred, is made liable by the Public Health Act, 1848, or any Act incorporated therewith, or by this Act, and such expenses have been settled and apprtioned by the surveyors as payable by such owner, such apportionment shall be binding and conclusive upon such owner, unless within the expiration of three months from the time of notice being given by the local board, or their surveyor, of the amount of the proportion so settled by the said surveyor to be due from such owner, he shall by written notice dispute the same.

(2) *Reg.* v. *Livesey*, Q.B., May, 4, 1870. The question in this case arose under the temporary Act (26 & 27 Vict. c. 70), the Public Works (Manufacturing Districts) Act, 1863. The notice was proved to have been given under s. 69 of the Public Health Act, 1848, and s. 10 of the Act of 1863, to the appellants, and they had not objected within the time limited by the notice; Blackburn and Hannen, JJ., were of opinion that, under the absolute wording of s. 10, subs. (3) of

1870

JARROW LOCAL BOARD v. KENNEDY.

Quain, Q.C. (*J. Edge* with him), for the respondent, was not heard.

THE COURT (Mellor and Lush, JJ.), were clearly of opinion that it was necessary to prove the preliminary notice.

Judgment for the respondent.

Attorney for appellants: *J. Tucker.*
Attorney for respondent: *John Scaife.*

Nov. 12.

HIRST, APPELLANT; MOLESBURY, RESPONDENT.

Vagrant Act (5 *Geo.* 4, *c.* 83)—*Vagrant Act Amendment Act*, 1868 (31 *&* 32 *Vict. c.* 52,) *s.* 3—"*Playing, or Betting, with a Coin, or other Instrument of Gaming*"—"*Game of Chance*"—"*Place to which the Public are permitted to have Access.*"

Depositing a half-sovereign as a bet on a dog-race, is not "betting with a coin as an instrument of gaming at a game of chance," within the Vagrant Act Amendment Act (31 & 32 Vict. c. 52,) s. 3.

Quære, whether enclosed grounds, to which persons are admitted on payment of a price for admission, is "a place to which the public have or are permitted to have access" within the above section.

CASE stated by justices of Dewsbury under 20 & 21 Vict. c. 43.

The respondent laid an information against the appellant, for that he did, on, &c., unlawfully bet, by way of wagering and gaming with a certain coin, to wit, a half-sovereign, in a certain place to which the public are permitted to have access, at a certain game of chance called a dog-race, contrary to the statute.

The facts proved were that, in the afternoon of the 3rd of April,

---

26 & 27 Vict. c. 70, the appellants could not afterwards, in answer to an information for not paying their proportion of the expenses, set up that the street was not a highway, and the justices were therefore right in refusing to enter into that question. Mellor, J., was of a contrary opinion. Under s. 3, subs. (1), the board could borrow money for works which they were *authorized* to execute under the Local Government Act, 1858, and by s. 69 of the Act of 1848, which was made part of the Act of 1858, if the street were a highway, they had no power to do the works. The question of highway or no highway was, therefore, the foundation of the whole jurisdiction.

1870

HIRST v. MOLESBURY.

1870, the respondent went with another police constable to certain enclosed grounds, each paying 3*d.* for admittance. There were 300 or 400 persons in the grounds.

They saw a man with a book and pencil who was offering to bet odds against various dogs, which they were about to run in those grounds.

The appellant asked what odds he was betting against a dog called "Knight." The man said, "six to one," and the appellant said, "I'll take six half-sovereigns to one," and handed a sovereign to the man, who returned him a half-sovereign.

The race was shortly afterwards run; "Knight" ran second, and the appellant lost his half-sovereign.

It was submitted, on behalf of the appellant, that the facts did not bring the case within s. 3 of 31 & 32 Vict. c. 52 (The Vagrant Act Amendment Act, 1868) (1), nor within 5 Geo. 4, c. 83.

The justices convicted the appellant.

Sir J. B. Karslake, Q.C., for the appellant, contended: First that the place was not "a place to which the public have access, or are permitted to have access," within s. 3. Secondly, that a dog-race, or any other race, was not a game of chance, and that depositing a half-sovereign, as a wager, was not betting with any coin, as an instrument of gaming at a game of chance within the section. The amended statute, which has the word "coin" in addition to the words in the former Act, was passed in order to include pitch-and-toss, which had been held not within 5 Geo. 4, c. 83, by this Court, in *Watson* v. *Martin*. (2)

The respondent did not appear.

THE COURT (Mellor and Lush, JJ.), expressly abstaining from giving any opinion on the first point, were clearly of opinion that

(1) By 31 & 32 Vict. c. 52, after reciting that it is expedient to amend 5 Geo. 4, c. 83, it is enacted (s. 3), that "every person playing or betting, by way of wagering or gaming in any street, road, highway, or other open and public place, or in any place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering on gaming at any game or pretended game of chance, shall be deemed a rogue and vagabond" within the recited Act, and liable to be punished accordingly.

(2) 34 L. J. (M.C.) 50.

1870

HIRST v. MOLESBURY.

the appellant was not using the half-sovereign as "an instrument of gaming at a game of chance," within the meaning of the section.

Judgment for the appellant.

Attorneys for appellant: *Blakesley & Beswick, for Ibberson, Dewsbury.*

Nov. 25.

THE QUEEN *v.* THE JUSTICES OF KENT.
IN THE MATTER OF MERCER'S APPEAL.

Appeal to Quarter Sessions—Right to abandon one ground and proceed on others—Union Assessment Committee Acts, 1862 *and* 1864 (25 *&* 26 *Vict. c.* 103), *s.* 18; (27 *&* 28 *Vict. c.* 39), *s.* 1.

M. objected before the assessment committee, under 25 & 26 Vict. c. 103, s. 18, to the valuation list of a union, on the grounds that he was overrated, and that A. and B. were underrated. The committee refused to alter M.'s assessment, and made a small addition to A.'s, upon which M. refused to proceed with his objection to B.'s assessment. A rate having been made in accordance with the valuation list, M. appealed against the rate to the quarter sessions on the same grounds, and served A. and B. with notices. On the hearing B. objected that M. had not complied with 27 & 28 Vict. c. 39, s. 1, as, by abandoning his objection to B.'s assessment when before the committee, M. had not "failed to obtain relief." M. then offered to abandon the ground of appeal as to B., and claimed to proceed with the rest of the appeal:—

Held, that M. had a right to do this, and the sessions were bound to hear the appeal as to M.'s overrating and A.'s underrating on the merits.

Reg. v. *Cambridgeshire Justices* (1 L. M. & P. 47; 19 L. J. (M. C.) 130) questioned.

RULE calling upon the Justices of Kent to shew cause why a mandamus should not issue commanding them to enter continuances, and hear, on the merits, an appeal of Robert Mercer against a poor-rate for the parish of East Malling made on the 14th of April, 1870.

It appeared from the affidavits that a rate was made on the 21st of December, 1869, for the parish of East Malling in accordance with the valuation list of the Malling Union, in which Mercer was assessed in respect of his occupation of certain lands. Mercer, after due notice, appeared before the assessment committee of the union on the 17th of February, 1870, and objected that he was

overrated, and the committee refused to alter his assessment. Mercer then gave notice of appeal against the rate of the 21st of December for the Easter quarter sessions, and it was subsequently agreed between Mercer and the overseers that the appeal should stand over till the Midsummer sessions. Mercer, however, on the 6th of April, sent notices to all the requisite parties, and appeared again before the assessment committee on the 27th of April, and objected that he was overrated, and unequally rated as compared with Messrs. Pemble and Tassell, who were, also, occupiers of land, and that the Rev. W. L. Wigan was underrated in respect of his tithe rent-charge. Mercer's own rating was first gone into, and the committee again refused to alter it. Tassell's case was taken next, and the committee made a small addition to his assessment, upon which Mercer's agent expressed great dissatisfaction, and at once left the room, refusing to proceed with the objections to Messrs. Pemble's and Wigan's assessments.

In the mean time another rate had been made on the 14th of April, in which Mercer and the others were rated as in the rate of the 21st of December; and, at the end of May, Mercer gave notice of appeal against the rate for the Midsummer quarter sessions to all the requisite parties, including Messrs. Tassell, Wigan, and Pemble, the grounds of appeal being that Mercer was overrated, and unequally rated as compared with Messrs. Pemble and Tassell, and that Mr. Wigan was underrated in respect of his tithe rent-charge.

At the hearing on the 30th of June of the appeal against the rate of the 14th of April (1) the notices were duly proved, and what had taken place before the committee on the 27th of April was also proved.

It was objected, on behalf of Wigan, who alone appeared, that the appellant had not complied with 27 & 28 Vict. c. 39, s. 1, inasmuch as he had not "failed to obtain relief" from the committee as to Messrs. Wigan and Pemble, having abandoned the case without going into their assessments.

It was contended on behalf of the appellant that he had, in effect, failed to obtain relief as to Wigan and Pemble; but his

(1) It did not appear from the affidavits whether the appeal against the December rate was heard or not.

1870

THE QUEEN v. JUSTICES OF KENT.

counsel also contended that the appeal was divisible, and he offered to abandon the grounds of appeal as to Pemble and Wigan, and claimed to proceed with the rest of the appeal.

The sessions dismissed the whole appeal, on the ground that the appellant had not complied with the provisions of 27 & 28 Vict. c. 39, s. 1.

The appellant then obtained the present rule. (1)

F. J. Smith shewed cause on behalf of Wigan, and contended that the sessions were right in dismissing the appeal. It was not divisible; and not having failed to get relief as to one of the persons who he said were underrated, the appellant had no right to proceed against the others. At all events, the sessions were not

(1) 25 & 26 Vict. c. 103, s. 18: "Any overseer or overseers of any parish in any union who shall have reason to think that such parish is aggrieved by the valuation lists of any parish within such union, or any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may at any time after the deposit as aforesaid of such list, and before the expiration of twenty-eight days after the notice of the deposit as aforesaid, give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof, and where the ground of any objection shall be unfairness or incorrectness in the valuation of any hereditament in respect of which any person, other than the person objecting, is liable to be rated, or the omission of such hereditament, also give notice in writing of such objection, and of the ground thereof, to such other person."

27 & 28 Vict. c. 39, s 1: "Before any appeal shall be heard by any special or quarter sessions against a poor-rate made for any parish contained in any union to which the Union Assessment Act, 1862 (25 & 26 Vict. c. 103), applies, the appellant shall give twenty-one days notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: Provided, that . . . no person shall be empowered to appeal to any sessions against a poor-rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and, if they amend the same, shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly."

obliged to allow him to abandon one ground and proceed with the others. He relied on *Rex* v. *Brooke* (1), *Reg.* v. *Cambridgeshire Justices* (2), and *Reg.* v. *Cambridgeshire Justices* (3), and especially the last case, in which the sessions had refused to allow the appellant to abandon his appeal as to the underrating of those persons upon whom no notice of appeal had been served, and to proceed with the rest of the appeal; and Erle, J., held that the sessions were not bound to accede to the appellants' application, and refused a mandamus to hear. (4)

Biron and *Hayman* were not heard in support of the rule.

COCKBURN, C.J. I am of opinion that this rule must be made absolute. It is clear that the sessions would have been perfectly justified in refusing to allow the appellant to proceed as to the underrating of any person, whose case had not been gone into before the assessment committee; but it is hard to say on what grounds the sessions could refuse to hear the appeal, so far as the appellant was dissatisfied with the decision of the committee, with respect to those persons who had had notice of appeal, and who had been duly summoned before the committee, and with respect to whose assessments the committee had, after hearing him, refused the appellant the relief he deemed himself entitled to. The appellant's grievance was that he was overrated; as to this he had a right to appear before the assessment committee, and endeavour to obtain relief; moreover, he objected that Mr. Tassell and the others were underrated, and unequally rated as compared with his own rating, and as to this also it was competent to him to appear

(1) 9 B. & C. 915.

(2) 7 J. P. 306.

(3) 1 L. M. & P. 47; 19 L. J. (M.C.) 130.

(4) He was also understood by the reporter to contend that there was a fatal objection to the whole appeal, viz., that as the notices of objections before the committee were sent on the 6th of April, before the rate of the 14th of April was made, they could only apply to the rate of the 21st of December; and therefore, as to the present rate of the 14th of April, Mercer had not failed to obtain relief at all. As to this, see *Reg.* v. *Great Western Ry. Co.* (Law Rep. 4 Q. B. 323). This objection does not appear to have been taken at the sessions; and quære whether it was tenable, as the committee heard the objections on the 27th of April, several days after the present rate was made, and so in effect may be said to have refused relief as to this rate. It is to be observed, however, that the above case was not brought to the notice of the Court; and the Court in no way adverted to this objection.

1870

THE QUEEN v. JUSTICES OF KENT.

before the committee and point out the inequalities he complained of, and demand that the objections should be considered and rectified if established. And if he failed, he might appeal to the quarter sessions. It is very true that it is an essential preliminary to his being heard, both before the committee and at the sessions, as to those persons whose rating he proposes to contrast with his own, that he shall have given notice to them, inasmuch as their assessments may be raised. And, no doubt, Sir W. Erle, in *Reg.* v. *Cambridgeshire Justices* (1), seems to have held that, where there was an appeal on the ground that several persons were underrated, and some had had notice and some not, it was not competent to the appellant to abandon his appeal as to some and go on as to the others. It is difficult to understand or maintain such a proposition; and, with the greatest respect to Sir W. Erle, I cannot assent to such a doctrine, I cannot but think that learned judge for once must have been wrong. Possibly his decision arose from a misconception of the previous case of *Reg.* v. *Cambridgeshire Justices.* (2) In that case there had been no notice served on the parties named in the appeal as underrated, and no offer was made to abandon the appeal with reference to them. Here all the proper persons were served with notices, and were, therefore, or might have been, before the court; but the sessions held that, inasmuch as the appellant had not pressed his whole case before the committee, his whole appeal had fallen to the ground. The facts were that with reference to two out of the three persons to whose assessment the appellant had objected before the committee he withdrew, being dissatisfied with the committee's decision as to his own rating and that of Mr. Tassell. The sessions, therefore, may have been right in saying that the appellant had not failed to obtain relief against Mr. Wigan and the other, because he had not done all in his power by pressing the case against them, and in refusing to decide the appeal as to those persons; but they were bound nevertheless to go into the merits, and hear the appeal as to the appellant's own assessment and that of Tassell, inasmuch as the case as to them had been gone into by the committee; and the rule must therefore be made absolute for a mandamus.

(1) 1 L. M. & P. 47; 19 L. J. (M.C.) 130.
(2) 7 J. P. 306.

1870

THE QUEEN v. JUSTICES OF KENT.

BLACKBURN, J. I am of the same opinion. The appellant, thinking himself overrated, and that others are underrated, wishes to get the inequality set right. The statute says a man shall not resort to the sessions unless he has been first before the assessment committee and failed to obtain relief. Here the appellant did go before the committee after proper notices, and did make objection, first, that he was overrated; and as to this the committee said he was wrong. Secondly, he objected that Mr. Tassell was unequally rated or underrated to a certain amount; the committee again said he was wrong, and made what the appellant considered a very insufficient addition to the assessment. Thereupon the appellant or his agent gets very angry and does not proceed with the objections against Messrs. Pemble and Wigan's assessments, although he had given them notice. The appellant then appeals on the same grounds to the quarter sessions against the rate, and says that he in effect failed to obtain relief as to all the grounds; but the sessions held that as he did not proceed with his objections to the extent to which he had given notice, he could not be said to have failed to obtain relief, and they refused to entertain the appeal. The sessions may have been right in saying the appellant had not failed to obtain relief as to two of his grounds of appeal; but one does not see why he should not have been allowed to proceed with the appeal on those grounds as to which he had been before the assessment committee and failed to obtain the relief which he thought himself entitled to. The very nature of the objections shews that the appeal was divisible; and I cannot see any reason or principle on which the sessions could have acted as they did. Most certainly it would be perfectly unjust to refuse the appellant his remedy so far as he had shewn himself entitled to it.

The cases cited are not at all conclusive of the matter. In *Rex* v. *Brooke* (1) and *Reg.* v. *Cambridgeshire Justices* (2), the persons who were said to be underrated had not been served with notices, and it may very well be that the sessions were right in refusing to hear the appeal; but as to the second case of *Reg.* v. *Cambridgeshire Justices* (3), I confess I cannot comprehend the reason of the decision; and at all events it does not go the length of deciding

(1) 9 B. & C. 915.
(2) 7 J. P. 306.
(3) 1 L. M. & P. 47; 19 L. J. (M.C.) 130.

1870

THE QUEEN v. JUSTICES OF KENT.

that when all the proper parties are before the court the sessions may commit such a piece of injustice as to refuse to hear such part of the appeal as is properly before them.

LUSH, J. I am of the same opinion. The reason, why notices are required to be given to parties who are alleged to be underrated, is that the sessions have power to surcharge them, and it is but fair, therefore, that they should be heard against the exaction. But I cannot see, if two persons are stated to be underrated in the grounds of appeal, and notice has been given to one only, why the quarter sessions cannot go on with the appeal as to the one who has had notice. Therefore I should have great difficulty in following the decision in *Reg.* v. *Cambridgeshire Justices* (1), were I called upon to do so. This, however, is a still stronger case. Here all the necessary parties had had notice, and Mr. Wigan was before the sessions, but it turned out that though he was also before the assessment committee, the appellant had not pressed the case against him. That might well be a reason for the sessions saying that the appellant could not proceed with the appeal against Wigan; but it could be no reason why they should not allow the appellant to abandon the appeal against him, and go on and determine the appeal on the merits as to the others.

Rule absolute.

Attorneys for appellant: *Mackeson, Taylor, & Arnould, for Norton & Son, West Malling.*

Attorney for respondents: *H. D. Wildes, West Malling.*

(1) 1 L. M. & P. 47; 19 L. J. (M.C.) 130.

GODARD AND ANOTHER *v.* GRAY AND ANOTHER. 1870

Dec. 10.

Foreign Judgment, Action on—How far Foreign Judgment examinable in English Court—Mistake of English Law apparent on Proceedings—Laches of Party in Foreign Court.

It is no bar to an action, on a judgment in personam of a foreign court having jurisdiction over the parties and cause, that the foreign tribunal has put a construction erroneous, according to English law, on an English contract.

Declaration on a judgment of a French court having jurisdiction in the matter. Plea setting out the judgment, from which it appeared that the suit was for the breach by the shipowner of a charterparty made in England, in which was a clause: "Penalty for the non-performance of this agreement, estimated amount of freight;" and that the court had treated this clause (contrary to the English law), as fixing the amount of damages recoverable, and had given judgment accordingly for the amount of freight. The proceedings shewed that both parties had appeared and been heard before the judgment was pronounced, but no objection was taken by the defendant to the mode of assessing the damages:—

Held, by Blackburn and Mellor, JJ., that the defendant could not set up, as an excuse for not paying money awarded by a judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to the English law, which was really a question of fact; and that it made no difference that the mistake appeared on the face of the proceedings.

By Hannen, J., that the French court could only be informed of foreign law by evidence; and the defendant, having neglected to bring the English law to the knowledge of the French court, could not impeach the judgment given against him on the ground of error as to that law.

DECLARATION that, on the 17th of April, 1867, in a suit between the plaintiffs and defendants in a French court, viz., the Civil Tribunal of First Instance, at Savenay, having jurisdiction in that behalf, the plaintiffs obtained judgment against the defendants for 17,812 francs, being 712*l.* 10*s.* in English money; and afterwards on appeal by the defendants, according to the law of France, to the Imperial Court of Rennes, having jurisdiction in that behalf, the Court reduced the judgment, and gave judgment for the plaintiffs for 8,921 francs, being 356*l.* 17*s.* 6*d.* in English money, which judgment is still in force and unsatisfied.

Pleas, 2: That the following is the record and tenor of the judgment and proceedings in the Court of Civil Tribunal of First Instance, and the proceedings in that court, and the judgment of the Imperial Court. [The plea set out the judgments, &c., in the

1870

GODARD v. GRAY.

original French, and then gave a translation at length; the following is an abstract of the judgment.] The Civil Tribunal of First Instance sitting at Savenay, &c., delivered the following judgment at its public sitting on the 17th of April, 1867:—Between Messrs. Charles Godard and Benjamin Coquard [the now plaintiffs], merchants, residing at St. Nazaire, plaintiffs, and Messrs. Gray Brothers [the now defendants], merchants, residing at Sunderland, England, defendants. Facts: The defendants, on the 12th and 16th of September, 1865, chartered to the plaintiffs the steamer *Como* for the conveyance of coal from Cardiff to St. Nazaire. After the first voyage the owners were to inform the freighters if they were willing to continue the charter for a year; and if they were not willing, the freighters reserved to themselves the right to require that the vessel should make two more voyages on the same conditions. This stipulation was for the purpose of securing supplies of coal to the plaintiffs' manufactory of patent fuel [briquettes de charbon]. In spite of the most urgent demands of the plaintiffs, the defendants did not place the *Como* at the disposal of the plaintiffs until the 12th of December, 1865. On the 15th of December she entered the port of St. Nazaire, and on the 20th she was discharged, and her freight settled. The owners having given notice that they did not intend to charter their vessel for a year, the plaintiffs required that she should make two more voyages on their account from Cardiff to St. Nazaire as agreed. Notwithstanding this express declaration, the *Como*, by order of the defendants, left on the 30th of December with a cargo of flour for Liverpool, and was thence chartered to Portugal. This non-performance of the agreement, and the delay in the first voyage, caused so great a loss and disturbance in the plaintiffs' business that they were driven to demand reparation. The defendants not having satisfied their just demands, the plaintiffs caused the defendants to be served with a summons on the 25th of January, 1866, to appear before the Civil Court of Savenay, judging in a commercial matter, to hear sentence by an executory judgment, by proceedings without security, and by arrest of the body [pour s'entendre condamner par jugement exécutoire par provisions sans caution et par corps], to pay to the plaintiffs by way of damages 50,000 francs for the injury caused to them by the non-performance of the agreements in the charter of

1870

GODARD v. GRAY.

the *Como*, and for the delay from the 12th of September to the 12th of December, 1865, in the first voyage.

The defendants not appearing, judgment, on the 22nd of February, 1866, was given against them by default for the 50,000 francs. The defendants applied to have the judgment set aside, and took exception to the competency of the Court. The Court overruled the exception; and the case was heard on the merits on the 17th of April, 1867, both parties being present by their attorneys and counsel. The Court, after hearing both sides, pronounced judgment, finding that the delay on the first voyage was not, under the circumstances proved, owing to the defendants' default, and that there were grounds for declaring that the plaintiffs' action was not maintainable on this head [il y a lieu de les déclarer non recevables de ce chef dans leur action]. On the second point, the Court found that the defendants had wilfully refused to allow the *Como* to proceed on the two other voyages; and the judgment proceeded: "Considérant qu'il y a donc eu de leur part une violation évidente du contrat qui les rend passibles de dommages intérêts: Considérant, quant au chiffre de ces dommages intérêts, qu'en présence de la clause pénale contenue à la charte-partie, le tribunal n'a point à rechercher le préjudice réel éprouvé par Godard et Coquard, et à examiner si la demande de 50,000 francs, au quel ils l'evaluent, est justifiée: Considérant en effet que la charte-partie contient une clause ainsi conçue, 'l'amende pour inexécution à ce présent contrat est estimée au montant total du fret' (1): Considérant que Godard et Coquard, ayant été privés de deux voyages, c'est donc une somme égale au fret de ces deux voyages à laquelle ils ont droit; qu'en prenant pour base la somme payée pour le fret du voyage qui a été effectué et qui s'élève, ainsi qu'il en a été justifié, au chiffre de 8,921, c'est donc une indemnité total de 17,812 (2) que les frères Gray doivent être condamnées à leur payer. . ."

"Par ces motifs statuant en matière commerciale et en premier ressort, Le Tribunal reçoit les frères Gray opposants en la forme au jugement par défaut, du 22 Février, 1866; au fond réduit à 17,812

(1) It will be observed that these are not the exact words of the clause: see post, p. 143.

(2) This is the sum given in words, but it ought to have been 17,842.

1870

GODARD v. GRAY.

francs la condemnation en dommages intérêts prononcée contre eux par le dit jugement," &c.

The judgment of the Imperial Court of Rennes, described as a final decree [arrêt définitif] of the 25th of August, 1867, recited, that the defendants appealed against the judgment of the civil tribunal of Savenay of the 17th of April, 1866, and prayed the Court to discharge the appellants from all the sentences pronounced against them. Further [subsidiarement], to reduce the damages to the amount of a single freight, that is to say, to 8921 francs, &c. The respondents [the plaintiffs], who also incidentally appealed, prayed the Court to declare that there were grounds for awarding them damages for the three months delay in the first voyage, and to award them damages accordingly; and to confirm the judgment appealed against, &c. The judgment then recited the facts and the judgment of the Court below, and that the following were the points of law to be decided: 1. Shall it be decided, as a matter of principle, that no damages can be claimed from the appellants on account of the chartering of the *Como*, and that they should be released from all the condemnations pronounced against them? 2. Shall it be declared, in any case, that the damages to which the respondents would be entitled cannot, by the terms of the penal clause, exceed the amount of a single freight? 3. Shall it be declared, in the cross-appeal, that the respondents are entitled to the damages claimed for the delay on the first voyage? &c. The judgment then proceeded, after hearing the allegations and arguments of the advocates of either party, and having duly deliberated according to law:—

"Considérant que la charte-partie, contractée entre Gray et Godard et Coquard, fixait l'indemnité à laquelle chacune des parties aurait droit pour inexécution de la convention par la faute de l'autre: Que cette indemnité, qualifiée d'amende dans le texte anglais, était de 8921 francs: Que moyennant paiement de cette indemnité chacune des parties avait le droit de rompre la convention; mais que l'inexécution du contrat et par suite sa rupture étant un fait unique, il ne pouvait y avoir lieu à autant d'indemnités que de manquements partiels dans le cours de l'affrêtement, ou à une indemnité pour la rupture et à dommages intérêts pour les griefs particuliers que chacune des parties pourrait imputer à

l'autre: Qu'en un mot, quelsque fussent les griefs d'une partie (à moins de cas sortant des provisions sous l'empire desquelles on avait traité), elle n'avait droit à rien, tant qu'elle ne justifiait pas que l'inexécution des clauses du contrat par la partie adverse était de nature à motiver la rupture et l'allocation à son profit des dommages intérêts réglés par la convention: Que du reste, l'indemnité de 8921 francs a été suffisante pour réparer le préjudice résultant de la non-livraison des deux cargaisons de charbons que le *Como* eut été tenu de transporter de Cardiff à Saint Nazaire: Adoptant au surplus les motifs des premiers juges sur le retard du navire à prendre la première cargaison: La Cour, corrigeantet reformant, dit que les dommages intérêts à payer par Gray frères à Godard et Coquard seront réduits à 8921 francs; et condamne Gray frères à leur payer cette somme avec les intérêts de droit à partir de la demande. Déclare mal fondé l'appel incident de Godard et Coquard, les en déboute ainsi que de leur offre de preuve," &c.

The plea then set out the charterparty, which was dated Sunderland the 12th of September, London the 16th of September, 1865, and was between the defendants, owners of the steamship *Como*, and S. Bregeon [agent of the plaintiffs], that the ship being tight, &c., shall with all convenient speed proceed to Cardiff, and take a full cargo of coals, which the merchants undertake to provide, and proceed to St. Nazaire. . . . "Penalty for non-performance of this agreement estimated amount of freight. This charter to be in force for one voyage, with option to owners of twelve months, commencing on the day she is delivered in Cardiff. . . . The owners are to declare, on the completion of the first voyage whether they will retain this charter for the twelve months; and in case they decline to do so, the charterer reserves to himself the right of retaining the boat for two more voyages on same conditions."

The plea, after setting out the charterparty, proceeded: "And the defendants further say, that the charterparty was made in England, and that defendants and Bregeon, in the charter mentioned, then were and still are British subjects, and domiciled and resident in England; and that the said judgments are erroneous, and ought to have been pronounced in favour of defendants, and that the same ought to have been pronounced and

1870

GODARD v. GRAY.

given according to the law of England and not of France; and that by the law of England, plaintiffs had no right to maintain any action or suit against defendants for any breach of the charterparty; and that there does not appear to have been, and was not, any breach of the charterparty entitling plaintiffs to have judgments pronounced in their favour in the said suit or on the said appeal.

Demurrer and joinder. (1)

May 6. *J. Brown, Q.C.*, (with him, *Murphy*) for the plaintiffs. The plea raises no defence. It appears from the French judgments that the plaintiffs sued the defendants for a breach of a charterparty by delay in sending the vessel on her first voyage under the charterparty, and also by not complying with the plaintiffs' demand, that she should go two more voyages on their account. In the first instance, judgment was given against the defendants by default for 50,000 francs; but, on the hearing, the Court of First Instance decided that the delay in the first voyage was not by the defendants' default, and as to the other breach, the Court gave judgment for the plaintiffs, and relying on the clause, "penalty for the breach of this agreement estimated amount of freight," awarded the estimated amount of freight on two voyages. On appeal to the Imperial Court, the defendants prayed for a reversal of the judgment, or that the damages might be reduced to the amount of freight of one voyage. And this latter was the view that the Court adopted. The defendants are therefore clearly estopped from now setting up that this judgment was erroneous. It was the view of the law which they themselves propounded to the French court.

Matter which is ground for writ of error cannot be pleaded in bar to an action on a judgment: *Dick* v. *Tolhausen*; (2) *Horsy* v. *Daniel*; (3) *Snook* v. *Mattock*; (4) *Bradley* v. *Eyre*; (5) 1 Roll. Abr. 604, l. 20; [cited in Vin. Abr. Debt (X.) pl. 3, and Com. Dig. Pleader (2 W. 39)]; Com. Dig. Error, D. Matter which might have been

(1) There were also two replications and demurrers thereto; but the arguments and judgments proceeded on the plea only.

(2) 4 H. & N. 695.

(3) 2 Lev. 161.

(4) 5 A. & E. 239.

(5) 11 M. & W. 432, 451.

1870

GODARD v. GRAY.

pleaded by way of defence in the foreign court cannot be set up as a defence to an action on a foreign judgment: *Vanquelin* v. *Bouard.* (1) The objection here set up amounts to saying the judgment is erroneous on the merits; and that is not an admissible defence: *De Cosse Brissac* v. *Rathbone* (2); *Bank of Australasia* v. *Nias* (3); *Scott* v. *Pilkington* (4); Notes to *Doe* v. *Oliver.* (5) Had there been a perverse disregard of the English law apparent on the proceedings, possibly there would have been a defence: see *Novelli* v. *Rossi* (6); *Simpson* v. *Fogo* (7); *Castrique* v. *Imrie* (8); and the law is so laid down in the Notes to *Doe* v. *Oliver.* (9)

[BLACKBURN, J. In the original notes by Mr. Smith [see 2nd ed. p. 448], there is no such qualification.]

There is no authority for the proposition that a judgment, appearing on the face of the proceedings to be founded on a mistake of English law, can be questioned. Foreign law is a fact, and must be proved like any other fact: Story's Conflict of Laws [§§ 637–8, note, citing *Trasher* v. *Everhart* (10), and Lord Mansfield in *Mostyn* v. *Fabrigas* (11): "The way of knowing foreign laws is by admitting them to be proved as facts."] The defendants therefore having omitted to bring evidence of the English law before the French court, cannot now set up as a defence what they have omitted to avail themselves of in the French court.

Shield (*Manisty, Q.C.*, with him), for the defendants. The question is, is the Court constrained by considerations of comity to give effect to a foreign judgment without any examination into the grounds of it? As to this, Story in his Conflict of Laws, § 598, says: "As to judgments in personam. And here a distinction is commonly taken between suits brought by a party to enforce a foreign judgment, and suits brought against a party who

(1) 15 C. B. (N.S.) 341, 368; 33 L. J. (C.P.) 78, 84.
(2) 6 H. & N. 301; 30 L. J. (Ex.) 238.
(3) 16 Q. B. 717, 737; 20 L. J. (Q.B.) 284, 292.
(4) 2 B. & S. 11; 31 L. J. (Q.B.) 81.
(5) 2 Sm. L. C. 6th ed. p. 732.
(6) 2 B. & Ad. 757.
(7) 1 John. & H. 18; 29 L. J. (Ch.) 657; 1 Hem. & M. 195; 32 L. J. (Ch.) 249.
(8) 8 C. B. (N.S.) 405, 419; 30 L. J. (C.P.) 177, 184.
(9) 2 Sm. L. C. 6th ed. at p. 448.
(10) 3 Gill & John. (U. S. Rep.) 234, 242.
(11) Cowp. at p. 174.

1870

GODARD v. GRAY.

sets up a foreign judgment in bar of the suit by way of defence. In the former case it is often urged, that no sovereign is bound jure gentium to execute any foreign judgment within his dominions; and, therefore, if execution of it is sought in his dominions, he is at liberty to examine into the merits of the judgment, and to refuse to give effect to it, if upon such examination it should appear unjust and unfounded. He acts in executing it upon the principles of comity; and has therefore a right to prescribe the terms and limits of that comity." Story then points out that it is otherwise when a foreign judgment of a competent tribunal is set up as a defence to an action, for it is then res judicata; and he proceeds to shew that this distinction has been frequently recognized; and he cites (§ 599) from the judgment of Eyre, C.J., in *Phillips* v. *Hunter* (1): "If we had the means we could not examine a judgment of a Court in a foreign state brought before us in this manner." [That is, by the defendant as a bar]. "It is in one way only that the sentence of a judgment of the court of a foreign state is examinable in our courts, and that is when the party, who claims the benefit of it, applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory, perhaps, in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory; not as conclusive, but as matter in pais; as a consideration primâ facie sufficient to raise a promise. We examine it as we do all other considerations or promises; and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by law." In *Reimers* v. *Druce* (2), the Master of the Rolls held that a foreign judgment was impeachable for error apparent on the face of it; and the reasons attached to a foreign judgment are part of the record for this purpose.

J. Brown, Q.C., in reply. No answer has been attempted to the proposition that the defendants are estopped by their conduct in the French court from now saying there has been a mistake in the English law.

Cur. adv. vult.

(1) 2 H. Bl. at p. 410. (2) 23 Beav. 145, 154; 26 L. J. (Ch.) 196, 200.

3 Jur. N.S. 147

Dec. 10. The following judgments were delivered:— 1870

The judgment of Blackburn and Mellor, JJ., was delivered by

GODARD v. GRAY.

Post 159

BLACKBURN, J. In this case the plaintiffs declare on a judgment of a French tribunal, averred to have jurisdiction in that behalf.

The question arises on a demurrer to the second plea, which sets out the whole proceedings in the French court. By these it appears that the plaintiffs, who are Frenchmen, sued the defendants, who are Englishmen, on a charterparty made at Sunderland, which charterparty contained the following clause, "Penalty for non-performance of this agreement, estimated amount of freight." The French court below, treating this clause as fixing the amount of liquidated damages, gave judgment against the defendants for the amount of freight on two voyages. On appeal, the superior court reduced the amount to the estimated freight of one voyage, giving as their reason that the charterparty itself "fixait l'indemnité à laquelle chacune des parties aurait droit pour inexécution de la convention par la faute de l'autre; que moyennant paiement de cette indemnité chacune des parties avait le droit de rompre la convention," and the tribunal proceeds to observe that the amount thus decreed was after all more than sufficient to cover all the plaintiffs' loss.

All parties in France seem to have taken it for granted that the words in the charterparty were to be understood in their natural sense; but the English law is accurately expressed in Abbott on Shipping, part 3, c. 1, s. 6, 5th ed., p. 170, and had that passage been brought to the notice of the French tribunal, it would have known that in an English charterparty, as is there stated, "Such a clause is not the absolute limit of damages on either side; the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may, in such action, recover damages beyond the amount of the penalty, if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penal clause, he cannot, in effect, recover more than the damage actually sustained." But it was not brought to the notice of the French tribunal that according to the interpretation put by the English law on such a contract, a penal clause of this sort was in fact idle and inoperative. If it had been, they would, probably, have interpreted the English

1870

GODARD v. GRAY.

contract made in England according to the English construction. No blame can be imputed to foreign lawyers for not conjecturing that the clause was merely a brutum fulmen. The fault, if any, was in the defendants, for not properly instructing their French counsel on this point.

Still the fact remains that we can see on the face of the proceedings that the foreign tribunal has made a mistake on the construction of an English contract, which is a question of English law; and that, in consequence of that mistake, judgment has been given for an amount probably greater than, or, at all events, different from that for which it would have been given if the tribunal had been correctly informed what construction the English contract bore according to English law.

The question raised by the plea is, whether this is a bar to the action brought in England to enforce that judgment, and we are all of opinion that it is not, and that the plaintiff is entitled to judgment.

The following are the reasons of my Brother Mellor and myself. My Brother Hannen, though agreeing in the result, qualifies his assent to these reasons to some extent, which he will state for himself.

It is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries, unless where there are reciprocal treaties to that effect. But in England and in those states which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke, B., in *Williams* v. *Jones* (1): "Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced." And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the perform-

(1) 13 M. & W. at p. 633.

1870

GODARD v. GRAY.

ance of it, must form a good defence to the action. It must be open, therefore, to the defendant to shew that the Court which pronounced the judgment had not jurisdiction to pronounce it, either because they exceeded the jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the foreign judgment must be examinable. Probably the defendant may shew that the judgment was obtained by the fraud of the plaintiff, for that would shew that the defendant was excused from the performance of an obligation thus obtained; and it may be that where the foreign Court has knowingly and perversely disregarded the rights given to an English subject by English law, that forms a valid excuse for disregarding the obligation thus imposed on him; but we prefer to imitate the caution of the present Lord Chancellor, in *Castrique* v. *Imrie* (1), and to leave those questions to be decided when they arise, only observing that in the present case, as in that, "the whole of the facts appear to have been inquired into by the French Courts, judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them they came to a conclusion which justified them in France in deciding as they did decide."

There are a great many dicta and opinions of very eminent lawyers, tending to establish that the defendant in an action on a foreign judgment is at liberty to shew that the judgment was founded on a mistake, and that the judgment is so far examinable. In *Houlditch* v. *Donegall* (2), Lord Brougham goes so far as to say: "The language of the opinions on one side has been so strong, that we are not warranted in calling it merely the inclination of our lawyers; it is their decision that in this country a foreign judgment is only primâ facie, not conclusive evidence of a debt." But there certainly is no case decided on such a principle; and the opinions on the other side of the question are at least as strong as those to which Lord Brougham refers.

Indeed it is difficult to understand how the common course of pleading is consistent with any notion that the judgment was only evidence. If that were so, every count on a foreign judgment must be demurrable on that ground. The mode of pleading shews

(1) Law Rep. 4 H. L. at p. 445. (2) 2 Cl. & F. at p. 477.

1870

GODARD v. GRAY.

that the judgment was considered, not as merely primâ facie evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least primâ facie, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question; but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter evidence negativing the existence of that original cause of action.

If, on the other hand, there is a primâ facie obligation to obey the judgment of a tribunal having jurisdiction over the party and the cause, and to pay the sum decreed, the question would be, whether it was open to the unsuccessful party to try the cause over again in a court, not sitting as a court of appeal from that which gave the judgment. It is quite clear this could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal. But we think it unnecessary to discuss this point, as the decisions of the Court of Queen's Bench in *Bank of Australasia* v. *Nias* (1), of the Court of Common Pleas in *Bank of Australasia* v. *Harding* (2), and of the Court of Exchequer in *De Cosse Brissac* v. *Rathbone* (3), seem to us to leave it no longer open to contend, unless in a court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law.

But there still remains a question which has never, so far as we know, been expressly decided in any court.

It is broadly laid down, by the very learned author of Smith's Leading Cases, in the original note to *Doe* v. *Oliver* (4), that "it is clear that if the judgment appear on the face of the proceedings to be founded on a *mistaken notion* of the English law," it would not be conclusive. For this he cites *Novelli* v. *Rossi* (5), which does not decide that point, and no other authority; but the great

(1) 16 Q. B. 717; 20 L. J. (C.P.) 284.

(2) 9 C. B. 661; 19 L. J. (C.P.) 345.

(3) 6 H. & N. 301; 30 L. J. (Ex.) 238.

(4) 2 Sm. L. C. 2nd ed. at p. 448.

(5) 2 B. & Ad. 757.

learning and general accuracy of the writer makes his unsupported opinion an authority of weight; and accordingly it has been treated with respect. In *Scott* v. *Pilkington* (1), the Court expressly declined to give any opinion on the point not then raised before them. But we cannot find that it has been acted upon; and it is worthy of note that the present very learned editors of Smith's Leading Cases have very materially qualified his position, and state it thus, if the judgment "be founded on *an incorrect view* of the English law, *knowingly or perversely acted on*;" (2) the doctrine thus qualified does not apply to the present case, and there is, therefore, no need to inquire how far it is accurate.

But the doctrine as laid down by Mr. Smith does apply here; and we must express an opinion on it, and we think it cannot be supported, and that the defendant can no more set up as an excuse, relieving him from the duty of paying the amount awarded by the judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact.

It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to inquire whether the defendant is relieved from a primâ facie duty to obey the judgment, he must be equally relieved, whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law, and any other mistake. No doubt the English Court can, without arrogance, say that where there is a difference of opinion as to English law, the opinion of the English tribunal is probably right; but how would it be if the question had arisen as to the law of some of the numerous portions of the British dominions where the law is not that of England? The French tribunal, if incidentally inquiring into the law of Mauritius, where French law prevails, would be

(1) 2 B. & S. at p. 42; 31 L. J. (Q.B.) at p. 89.

(2) See 2 Sm. L. C. 5th & 6th edd. by Maude and Chitty, at pp. 683 & 726 respectively.

1870

GODARD v. GRAY.

more likely to be right than the English Court; if inquiring into the law of Scotland it would seem that there was about an equal chance as to which took the right view. If it was sought to enforce the foreign judgment in Scotland, the chances as to which Court was right would be altered. Yet it surely cannot be said that a judgment shewn to have proceeded on a mistaken view of Scotch law could be enforced in England and not in Scotland, and that one proceeding on a mistaken view of English law could be enforced in Scotland but not in England.

If, indeed, foreign judgments were enforced by our Courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our Courts would not be so rude as to inquire whether the foreign Court had made a mistake, or to allow the defendant to assert that it had, yet that if the foreign Court itself admitted its blunder they would not then act: but it is quite contrary to every analogy to suppose that an English Court of law exercises any discretion of this sort. We enforce a legal obligation, and we admit any defence which shews that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defence shall be admitted if it is easily proved, and rejected if it would give the Court much trouble to investigate it. Yet on what other principle can we admit as a defence that there is a mistake of English law apparent on the face of the proceedings, and reject a defence that there is a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which the defendant avers that he can shew did exist.

The whole law was much considered and discussed in *Castrique* v. *Imrie*(1), where the French tribunal had made a mistake as to the English law, and under that mistake had decreed the sale of the defendant's ship. The decision of the House of Lords was, that the defendant's title derived under that sale was good, notwithstanding that mistake: Lord Colonsay pithily saying, "It appears to me that we cannot enter into an inquiry as to whether the French Courts proceeded correctly, either as to their own course of procedure or their own law, nor whether under the circumstances they

(1) Law Rep. 4 H. L. 414, 448.

took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is, whether under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship."

The question in *Castrique* v. *Imrie* (1) was as to the effect on the property of a judgment ordering a ship, locally situate in France, to be sold, and therefore was not the same as the question in this case as to what effect is to be given to a judgment against the person. But at least the decision in *Castrique* v. *Imrie* (1) establishes this, that a mistake as to English law on the part of a foreign tribunal does not operate in all cases so as to prevent the courts of this country from giving effect to the judgment.

In the course of the arguments in that case the point now under consideration was raised. In the opinion I delivered at the bar of the House (2), the cases which are commonly referred to as authorities for the opinion expressed by Mr. Smith in his note to *Doe* v. *Oliver* (3), are referred to. We have nothing to add to what is there said. And in the case of *Novelli* v. *Rossi* (4), it will be found on perusing the judgment of Lord Tenterden that it does not contain one word in support of the doctrine for which it is cited. We think that case was rightly decided for the reasons given in *Castrique* v. *Imrie* (5); but at all events it does not bear out Mr. Smith's position.

For these reasons we have come to the conclusion that judgment should be given for the plaintiffs.

HANNEN, J. I agree that our judgment should be for the plaintiffs in this case, but as I do not entirely concur in the reasoning by which my Brothers Blackburn and Mellor have arrived at that conclusion, I desire shortly to explain the ground on which my judgment is founded.

I think that the authorities oblige us (not sitting in a court of error) to hold that the defendants, by appearing in the suit in

(1) Law Rep. 4 H. L. 414.
(2) Law Rep. 4 H. L. at pp. 434–435.
(3) 2 Sm. L. C. 2nd ed. at p. 448.
(4) 2 B. & Ad. 757.
(5) Law Rep. 4 H. L. at p. 435.

1870

GODARD v. GRAY.

France, submitted to the jurisdiction of the French tribunal, and thereby created a primâ facie duty on their part to obey its decision; but I do not think that any authority binds us, nor am I prepared to decide that a defendant, not guilty of any laches, against whom a foreign judgment in personam has been given, is precluded from impeaching it on the ground that it appears on the face of the proceedings to be based on an incorrect view of the English law, even though there may be no evidence that the foreign Court, knowingly or perversely, refused to recognize that law.

I do not, however, enter at length upon the consideration of this question, because I have arrived at the conclusion that the defendants in this case were guilty of laches. It does not appear upon the face of the proceedings, nor at all, that the French Court was informed of what the English law was. It was the duty of the defendants to bring to the knowledge of the French Court the provision of the English law on which they now for the first time rely, and having failed to do so, they must submit to the consequences of their own negligence. The French Courts, like our own, can only be informed of foreign law by appropriate evidence, and the party who fails to produce it cannot afterwards impeach the judgment obtained against him on account of an error into which the foreign Court has fallen presumably in consequence of his own default. Suitors in our own courts, in similar circumstances, must suffer a like penalty for their negligence. A defendant who has omitted to produce evidence which was procurable at the trial of a cause cannot have a rehearing on that account; and in an action on a judgment of one of our own Courts, we do not permit the defendant to plead any facts which might have been pleaded in the original action. These instances offer analogies by which I think the present case is governed, and on this ground I am of opinion that the defendants are precluded from impeaching the decision of the French tribunal, and that our judgment should be for the plaintiffs.

Judgment for the plaintiffs (1).

Attorneys for plaintiffs: *Abrahams & Roffey.*
Attorney for defendants: *Hickin.*

(1) See the next case.

SCHIBSBY *v.* WESTENHOLZ AND OTHERS. 1870

Dec. 10.

Action—Foreign Judgment—Judgment for default of Appearance against a Defendant not Resident nor a Subject of the Country.

A judgment of a foreign court, obtained in default of appearance against a defendant, cannot be enforced in an English court, where the defendant, at the time the suit commenced, was not a subject of nor resident in the country in which the judgment was obtained: for there existed nothing imposing on the defendant any duty to obey the judgment.

DECLARATION, that in parts beyond the seas, out of the dominions of the Queen, viz., in the empire of France, in a suit depending between the now plaintiff and the defendants, in the Tribunal of Commerce at Caen, being a court duly holden, and having jurisdiction in that behalf, the plaintiff recovered against the defendants, by the judgment of the court, the sum of 11,537 francs and 60 centimes, in English money, 461*l* 10*s*., which the now defendants were, by the court, ordered to pay to the now plaintiff, and interest. Averments of conditions precedent, and breach that the defendants did not pay the money.

Pleas: 1. Never indebted. 2. That the court of the Tribunal of Commerce at Caen was not a court duly holden and having jurisdiction as alleged. 3. That the action was commenced according to the laws then and still in force in the empire of France by process and summons, and that the defendants were not, nor were any of them, at the time of the commencement thereof, or at any time previous to the recovery of the judgment resident or domiciled within the jurisdiction of the court, nor are the defendants, nor any of them, natives of the empire of France; and they were not at any time before the recovery of the judgment served with any process or summons in the action, nor did the defendants appear in the action, nor had they, before the recovery of the judgment, any notice or knowledge of any process or summons, or of any proceedings in the action, or any opportunity of defending themselves therein.

Issue thereon.

At the trial, before Blackburn, J., at the London sittings after Hilary Term, 1870, a verdict was found for the plaintiff with leave

1870

SCHIBSBY v. WESTENHOLZ.

to move to enter a verdict for the defendants, on the ground of want of jurisdiction.

The evidence and course of the trial are fully stated in the judgment of the Court.

A rule having been obtained pursuant to the leave,

Nov. 22. *Brown, Q.C.*, and *Murphy*, shewed cause.

Nov. 26. Sir *G. Honyman, Q.C.*, and *Watkin Williams*, in support of the rule. The arguments are fully noticed in the judgment of the Court. In addition to those mentioned in the judgment, the following authorities were cited: *Cavan* v. *Stewart* (1); *Crawford* v. *Whittal* (2); *Maubourquet* v. *Wyse* (3); *Bank of Australasia* v. *Nias* (4); *Becquet* v. *MacCarthy* (5); *Don* v. *Lippmann* (6); *Vallee* v. *Dumergue* (7); *Meeus* v. *Thellusson* (8); *Bissell* v. *Briggs* (9); *Jefferys* v. *Boosey* (10); *Yelverton* v. *Yelverton*. (11) Story on the Conflict of Laws, ss. 547, 609, 610; Wheaton's International Law, 288–291.

Cur. adv. vult.

Dec. 10. The judgment of the Court (Blackburn, Mellor, Lush and Hannen, JJ.) was delivered by

BLACKBURN, J. This was an action on a judgment of a French tribunal given against the defendants for default of appearance.

The pleas to the action were, amongst others, a plea of never indebted, and, thirdly, a special plea asserting that the defendants were not resident or domiciled in France, or in any way subject to the jurisdiction of the French court, nor did they appear; and that they were not summoned, nor had any notice or knowledge of the pending of the proceedings, or any opportunity of defending themselves therefrom. On these pleas issue was joined.

On the trial before me the evidence of a French avocat was

(1) 1 Stark. N. P. 525.
(2) 1 Doug. at p. 4, n. 1.
(3) Ir. Rep. 1 C. L. 471.
(4) 16 Q. B. 717; 20 L. J. (Q.B.) 284.
(5) 2 B. & Ad. 951.
(6) 5 C. & F. 1.
(7) 4 Ex. 290; 18 L. J. (Ex.) 398.
(8) 8 Ex. 638; 22 L. J. (Ex.) 239.
(9) 9 Mass. R. 462.
(10) 4 H. L. C. 815; 23 L. J. (Ex.) 350.
(11) 1 Sw. & Tr. 574; 29 L. J. (P. M. & A.) 34.

given, by which it appeared that by the law of France a French subject may sue a foreigner, though not resident in France, and that for this purpose an alien, if resident in France, was considered by the French law as a French subject. (1) The mode of citation in such a case, according to the French law, is by serving the summons on the Procureur Impérial. If the foreign defendant thus cited does not within one month appear, judgment may be given against him, but he may still, at any time within two months after judgment, appear and be heard on the merits. After that lapse of time the judgment is final and conclusive. The practice of the imperial government is, in such a case, to forward the summons thus served to the consulate of the country where the defendant is resident, with directions to intimate the summons, if practicable, to the defendant; but this, as was explained by the avocat, is not required by the French law, but is simply done by the imperial government voluntarily from a regard to fair dealing.

It appeared by other evidence that the plaintiff in this case was a Dane resident in France. The defendants were also Danes, resident in London and carrying on business there. A written contract had been made between the plaintiff and defendants, which was in English, and dated in London, but no distinct evidence was given as to where it was signed. We think, however, that, if that was material, the fair intendment from the evidence was that it was made in London. By this contract the defendants were to ship in Sweden a cargo of Swedish oats free on board a French or Swedish vessel for Caen, in France, at a certain rate for all oats delivered at Caen. Payment was to be made on receipt of the shipping documents, but subject to correction for excess or deficiency according to what might turn out to be the delivery at Caen. From the correspondence it appeared that the plaintiff asserted, and the defendants denied, that the delivery at

(1) See Article 14 of the Code Civil: "L'étranger même non residant en France pourra être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un français; il pourra être traduit devant les tribunaux de France pour les obligations par lui contractées en pays étranger envers des français."

Codes Annotés de Sirey: Code Civil, Art. 14, Note 42: "Un étranger qui a une maison de commerce établie et patente en France, peut, aussi bien qu'un français, assigner un autre étranger devant un tribunal français."

1870

SCHIBSBY v. WESTENHOLZ.

Caen was short of the quantity for which the plaintiff had paid, and that the plaintiff made some other complaints as to the condition of the cargo which were denied by the defendants. The plaintiff very plainly told the defendants that if they would not settle the claim he would sue them in the French courts. He did issue process in the manner described, and the French consulate in London served on the defendants a copy of the citation.

The following admissions were then made, namely: that the judgment was regular according to French law; that it was given in favour of the plaintiff, a foreigner domiciled in France, against the defendants, domiciled in England, and in no sense French subjects, and having no property in France.

I then ruled that I could not enter into the question whether the French judgment was according to the merits, no fraud being alleged or shewn.

I expressed an opinion (which I have since changed) that, subject to the third plea, the plaintiff was entitled to the verdict, but reserved the point.

The jury found that the defendants had notice and knowledge of the summons and the pendency of the proceedings in time to have appeared and defended the action in the French court. I then directed the verdict for the plaintiff, but reserved leave to enter the verdict for the defendants on these facts and this finding.

No question was raised at the trial as to the sufficiency of the pleas to raise the defence. If there had been, I should have made any amendment necessary, but, in fact, we are of opinion that none was required.

A rule was accordingly obtained by Sir George Honyman, against which cause was shewn in the last term and in the sittings after it before my Brothers Mellor, Lush, Hannen, and myself. During the interval between the obtaining of the rule and the shewing cause the case of *Godard* v. *Gray* (1), on which we have just given judgment, was argued before my Brothers Mellor, Hannen, and myself, and we had consequently occasion to consider the whole subject of the law of England as to enforcing foreign judgments.

(1) Ante, p. 139.

1870

SCHIBSBY v. WESTENHOLZ.

My Brother Lush, who was not a party to the discussions in *Godard* v. *Gray* (1), has, since the argument in the present case, perused the judgment prepared by the majority in *Godard* v. *Gray* (1), and approves of it; and, after hearing the argument in the present case, we are all of opinion that the rule should be made absolute.

It is unnecessary to repeat again what we have already said in *Godard* v. *Gray*. (1)

We think that, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in *Russell* v. *Smyth* (2), and again repeated by him in *Williams* v. *Jones* (3), that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

We were much pressed on the argument with the fact that the British legislature has, by the Common Law Procedure Act, 1852, (15 & 16 Vict. c. 76), ss. 18 and 19, conferred on our courts a power of summoning foreigners, under certain circumstances, to appear, and in case they do not, giving judgment against them by default. It was this consideration principally which induced me at the trial to entertain the opinion which I then expressed and have since changed. And we think that if the principle on which foreign judgments were enforced was that which is loosely called "comity," we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, mutatis mutandis, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down.

Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our courts could enter-

(1) Ante, pp. 139, 147. (2) 9 M. & W. at p. 819.
(3) 13 M. & W. at p. 633.

1870

SCHIBSBY v. WESTENHOLZ.

tain would be whether the Acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if, judgment being given against him in our courts, an action were brought upon it in the courts of the United States (where the law as to the enforcing foreign judgments is the same as our own), a further question would be open, viz., not only whether the British legislature had given the English courts jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognize to submit to the jurisdiction thus created. This is precisely the question which we have now to determine with regard to a jurisdiction assumed by the French jurisprudence over foreigners.

Again, it was argued before us that foreign judgments obtained by default, where the citation was (as in the present case) by an artificial mode prescribed by the laws of the country in which the judgment was given, were not enforceable in this country because such a mode of citation was contrary to natural justice, and if this were so, doubtless the finding of the jury in the present case would remove that objection. But though it appears by the report of *Buchanan* v. *Rucker* (1) that Lord Ellenborough in the hurry of nisi prius at first used expressions to this effect, yet when the case came before him in banco in *Buchanan* v. *Rucker* (2) he entirely abandoned what (with all deference to so great an authority) we cannot regard as more than declamation, and rested his judgment on the ground that laws passed by our country were not obligatory on foreigners not subject to their jurisdiction. "Can," he said, "the Island of Tobago pass a law to bind the rights of the whole world?"

The question we have now to answer is, Can the empire of France pass a law to bind the whole world? We admit, with perfect candour, that in the supposed case of a judgment, obtained in this country against a foreigner under the provisions of the Common Law Procedure Act, being sued on in a court of the United States, the question for the court of the United States would be, Can the Island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No, but every country can pass laws to bind a great many persons; and therefore

(1) 1 Camp. 63. (2) 9 East, 192.

1870

SCHIBSBY v. WESTENHOLZ.

the further question has to be determined, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce.

Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them.

If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued. But every one of those suppositions is negatived in the present case.

Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him.

In the case of *General Steam Navigation Company* v. *Guillou* (1), on a demurrer to a plea, Parke, B., in delivering the considered judgment of the Court of Exchequer, then consisting of Lord Abinger, C.B., Parke, Alderson, and Gurney, BB., thus expresses himself: "The substance of the plea is that the cause of action has been already adjudicated upon, in a competent court, against the plaintiffs, and that the decision is binding upon them, and that they ought not to be permitted again to litigate the same question. Such a plea ought to have had a proper commencement and conclusion. It becomes, therefore, unnecessary to give any opinion whether the pleas are bad in substance; but it is not to be understood that we feel much doubt on that question. They do not state that the plaintiffs were French subjects, or resident, or even present in France when the suit began, so as to be bound by reason of allegiance or temporary presence by the decision of a

(1) 11 M. & W. 877, 894.

1870

SCHIBSBY v. WESTENHOLZ.

French court, and they did not select the tribunal and sue as plaintiffs, in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence of the defendant as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey."

It will be seen from this that those very learned judges, besides expressing an opinion conformable to ours, also expressed one to the effect that the plaintiffs in that suit did not put themselves under an obligation to obey the foreign judgment, merely by appearing to defend themselves against it. On the other hand, in *Simpson* v. *Fogo* (1), where the mortgagees of an English ship had come into the courts of Louisiana, to endeavour to prevent the sale of their ship seized under an execution against the mortgagors, and the courts of Louisiana decided against them, the Vice-Chancellor and the very learned counsel who argued in the case seem all to have taken it for granted that the decision of the Court in Louisiana would have bound the mortgagees, had it not been in contemptuous disregard of English law. The case of *General Steam Navigation Company* v. *Guillou* (2) was not referred to, and therefore cannot be considered as dissented from; but it seems clear that they did not agree in the latter part of the opinion there expressed.

We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal. But we must observe that the decision in *De Cosse Brissac* v. *Rathbone* (3) is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour he is bound.

In *Douglas* v. *Forrest* (4) the Court, deciding in favour of the party suing on a Scotch judgment, say: "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those

(1) 1 John. & H. 18; 29 L. J. (Ch.) 657; 1 Hem. & M. 195; 32 L. J. (Ch.) 249.

(2) 11 M. & W. 877.

(3) 6 H. & N. 301; 30 L. J. (Ex.) 238.

(4) 4 Bing. at p. 703.

judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." Those circumstances are all negatived here. We should, however, point out that, whilst we think that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas* v. *Forrest* (1), we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground. It should rather seem that, whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment. But it is unnecessary to decide this, as the defendants had in this case no property in France. As to this, see *London and North Western Railway Company* v. *Lindsay*. (2)

We think, and this is all that we need decide, that there existed nothing in the present case imposing on the defendants any duty to obey the judgment of a French tribunal.

We think, therefore, that the rule must be made absolute.

Rule absolute. (3)

Attorneys for plaintiff: *Stibbard & Beck.*
Attorneys for defendants: *Thomas & Hollams.*

(1) 4 Bing. at p. 703. (2) 3 Macq. 99.
(3) See the preceding case.

1870
Nov. 9.

SAWYER, APPELLANT; THE VESTRY OF THE PARISH OF PADDINGTON, RESPONDENTS.

Sewers, Expense of constructing—"New Street"—Metropolitan Local Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *ss.* 52, 53, 112.

Section 52 of 25 & 26 Vict. c. 102, enacts that where any sewer shall be constructed for the drainage of any new street, the expense shall be defrayed by the owners of the land abutting on such street.

Section 53 enacts that where any sewer shall be constructed in a street in which there has been no sewer, but where sewer rates have been levied previously, the expense shall be defrayed in part only by the owners of the houses situate in and of the land abutting on such street; provided that no street or property in respect of which sewer rates have been levied for five years prior to the 1st of January, 1856, shall be subject to be charged under this section.

Section 112 enacts that the expression, "new street," shall include, amongst others, all streets the maintenance of the paving and roadway whereof had not previously to the passing of the Act been assumed by the local authorities.

The appellant, about the year 1866, built some houses abutting on the H. Road, and about the same time the vestry of the parish constructed a sewer along the H. Road. Sewer rates had been levied in respect of the land upon which the houses were built for more than five years prior to the 1st of January, 1856. Before 1866 no sewer existed in the H. Road, which was and continued to be a turnpike-road until the 1st of July, 1864, on which day the vestry took charge of it for the first time:—

Held, that the H. Road was a new street within the meaning of s. 112; that s. 53 did not apply to new streets, as defined by s. 112; and that the appellant was therefore liable to be rated under s. 52.

Vestry of St. Giles, Camberwell v. *Weller* (post p. 168, n. (1)), dissented from.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

The appellant was summoned under s. 52 (1) of the Metropolis

(1) 25 & 26 Vict. c. 102, s. 52. "Where any sewer shall, after the passing of this Act, be constructed by any vestry or district board in or for the drainage of any new street, or of any house or houses erected since the 1st of January, 1856, the expense of constructing such sewer, and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed by the owners of such street or houses, and of the land bounding or abutting on such street respectively, and the said expenses shall be apportioned by the vestry or district board in such proportions as they may deem just, and the amount charged upon or payable in respect of each house or premises shall be payable before the works shall be commenced, during their progress, or after their completion, as the vestry or

Management Amendment Act, 1862 (25 & 26 Vict. c. 102), for that he, being the owner of a house, No. 2, Frankford Terrace, Harrow Road, in the parish of Paddington, had not paid to the vestry his proportion of the expenses of the construction by the

---

district board shall in each case determine, either in one sum or by instalments, within such period, not exceeding twenty years, as the vestry or district board shall direct, and any such sum or instalments shall be recoverable from the present or any future owner of the said house or premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board."

S. 53: "Where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer or only an open sewer, but where sewers rates have been levied previously to such construction, the expense of constructing such sewer, and the works appertaining thereto, including the costs of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively; and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case; and the residue of such expenses shall be defrayed by the vestry or district board out of the sewers rate levied in their parish or district; and the amount so charged by the vestry or district board upon or in respect of each house or premises shall be payable either before the works shall be commenced, during their progress, or after their completion, as the vestry or board shall in each case determine, either in one sum or by instalments within such period, not exceeding twenty years, as the vestry or board shall direct; and any sum or instalment shall be recoverable from the present or any future owner of such house or premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board: Provided that no street or property in respect of which sewers rates have been levied for five years prior to the 1st of January, 1856, shall be subject to be charged under the provision contained in this section."

S. 112 enacts that ". . . the word 'street' shall be deemed to apply to and include the subject-matters specified in the 250th section of 18 & 19 Vict. c. 120, and also any mews and a part thereof; the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the paving and roadway whereof had not previously to the passing of this Act been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out."

18 & 19 Vict. c. 120, s. 250. "The word 'street' shall apply to and include any highway (except the carriageway of any turnpike road), and any road, &c., whether a thoroughfare or not, and a part of any such highway, road, &c."

1870

SAWYER v. PADDINGTON.

vestry of a sewer in the said Harrow Road, which was a new street within the meaning of the above Act.

On the hearing the following facts were proved:—In the early part of the year 1866 the parish of Paddington constructed a main sewer and all necessary gullies and side entrances in and along the western part of the Harrow Road, extending from Elgin Road to the extreme western boundary of the parish, for the purpose of its drainage; previously to the construction of such sewer there was no sewer on that portion of the Harrow Road. About that time the appellant built a row of houses called Frankford Terrace, of which he was and is the owner within the meaning of the Act, and of which the house No. 2 is one. This row of houses extended westward of the road called Elgin Road, and fronted the Harrow Road.

On the 7th of April, 1868, the vestry of Paddington passed a resolution apportioning the expenses of constructing such sewer and the works appertaining thereto, pursuant to s. 52 of the Act, among the owners of the property adjoining such road, and assessed the appellant accordingly.

The Harrow Road, eastward of the Elgin Road, has been built over for many years past. Sewer rates had been levied and paid in respect of the land upon which Frankford Terrace was built and of the adjoining land on either side of the Harrow Road for more than ten years prior to the 1st of January, 1856. The Harrow Road was in existence at the time of the reign of Queen Elizabeth, and in that reign estates were settled by one John Lyon, the founder of Harrow School, for the maintenance of the road from Harrow to London. Tolls were collected on the road by the trustees, and subsequently by the commissioners appointed by 7 Geo. 4, c. cxlii. The road has also been a high road to Kensal Green Cemetery since the foundation of that burial-ground; and from the time of the passing of the Act of 7 Geo. 4, c. cxlii., it remained a turnpike-road under the charge of the turnpike commissioners until the 1st of July, 1864, on which day, according to the provisions of the statute 26 & 27 Vict. c. 78, s. 2, the vestry of the parish took charge of it for the first time, and have thence continued to maintain and repair it. But for twenty years last past, in addition to the roadway, there has been a footway in

1870

SAWYER v. PADDINGTON.

front of the land upon which Frankford Terrace is built, and abutting upon the north side of the Harrow Road, and for such period, manifestly with the acquiescence of the commissioners, the footway has been maintained by the vestry of the parish of Paddington.

For the respondents, it was contended that the assessment was valid under s. 52 combined with the definition of new street in s. 112 of 25 & 26 Vict. c. 102, on the ground that the Harrow Road was a new street within the meaning of that section.

It was contended on behalf of the appellant :—

1. That the Harrow Road upon the facts above stated is not a new street within the meaning of s. 52 of the Act, it having been dedicated to the public and used as a highway for more than a century. And further, that as the Harrow Road was previously to the year 1864, that is to say, from the reign of Queen Elizabeth, maintained, paved, and taken in charge by "trustees" down to the seventh year of the reign of George IV., and thenceforth down to the 1st of July, 1864, by the commissioners appointed by the above-mentioned Act, and since then by the vestry of the parish, the Harrow Road is not a new street within the interpretation clause s. 112 of 25 & 26 Vict. c. 102. And that if it be not a new street, the case falls within s. 53 of the Act, and that under it the appellant is not chargeable with any portion of the expenses of the construction of any part of the sewer, except in common with all the other inhabitants of the parish.

2. That even assuming the Harrow Road to be a new street, still as sewer rates have been paid in respect of the land upon which Frankford Terrace was built for more than ten years prior to the 1st of January, 1856, the case falls within s. 53, and especially that the word "property," which occurs at the end of that section, includes "new streets" which have paid sewer rates for the above-mentioned period.

3. That the vestry is not at liberty to separate the part of the sewer opposite Frankford Terrace for the purpose of charging the owner of houses in the terrace with the assessment.

The magistrate decided that the Harrow Road is a new street, and that the appellant was liable for the assessment.

The question for the opinion of the Court was, whether under

1870

SAWYER v. PADDINGTON.

the above circumstances the appellant is liable to the claim of the vestry of the parish of Paddington.

Brown, Q.C. (*Talfourd Salter* with him), for the appellant. The appellant ought not to have been assessed. That portion of the Harrow Road on which the appellant's houses are built is not a new street within the meaning of s. 52 of 25 & 26 Vict. c. 102. This appears to follow from the definition of the expression "new street" in s. 112. But even if it is a new street, the appellant is not liable to be rated, because the case falls within s. 53. By s. 112 the word "street" is to be deemed to include the subject-matters specified in 18 & 19 Vict. c. 120, s. 250; and by s. 250 the word "street" is to apply to a highway (except the carriage-way of a turnpike-road); now the Harrow Road ceased in 1864 to be a turnpike-road, and therefore was a street within the meaning of s. 53. Then the conditions imposed by the proviso in s. 53 are fulfilled. There was no sewer in that portion of the road adjoining the appellant's houses, and the land upon which they were built had been assessed to the sewer rate for more than five years. The question is, in fact, concluded by authority: *Vestry of St. Giles, Camberwell* v. *Weller* (1), in effect, decides the point. In that case

(1) *Vestry of St. Giles, Camberwell, appellants; Weller, respondent*:—

Ex. June 23, 1869. Case stated under 20 & 21 Vict. c. 43. A summons issued against the respondent for non-payment of his proportion of an assessment made by the appellants under 25 & 26 Vict. c. 102, s. 52. The assessment was made by a resolution of the vestry, by which, after declaring their intention to construct a sewer in a new street called the Crystal Palace Road, they apportioned the whole expense among the owners of the street and of the land abutting thereon. The respondent was one of such owners. The street was admitted to be a new street within s. 112 of 25 & 26 Vict. c. 102; but in the four years, from 1865 to 1868 inclusive, sewer rates had been levied on the occupiers of the property in the street; and it was contended by the respondent that this fact brought the case within s. 53, and that the expense of constructing the sewer ought to be divided as therein mentioned. The magistrate was of that opinion, and dismissed the summons.

The case was argued by *Keane, Q.C.*, for the appellants, and by *Joyce* for the respondent.

BRAMWELL, B. I think our judgment should be for the respondent. The true construction of the Act is to read the 52nd and 53rd sections together, treating s. 53 as if it were introduced by the word "but," or "provided." The language of s. 53, taken by itself, applies to new as well as to old streets; and if we were to read it otherwise the strange consequence would follow that, although where sewer rates have

1870

SAWYER v. PADDINGTON.

the owner of land abutting upon a new street, in respect of which sewer rates had been assessed, was rated at a sum which represented his proportion as owner of adjoining lands of the whole expense of constructing the sewer; the vestry, which imposed the rate, contended he was liable under s. 52. The owner alleged that he was liable to be assessed under s. 53 for a portion only of the expense, and the Court of Exchequer held the latter contention correct.

Dowdeswell, Q.C. (*G. Shaw* with him), for the respondents, was requested by the Court to confine his argument to the second point. Section 52 is alone applicable to the present case, and s. 53 refers merely to old streets. "Street" throughout the Act is kept distinct from "new street," and s. 53 therefore refers only to old streets. The effect of extending s. 53 to new streets would be, by the proviso, to exempt all land, which had paid, as agricultural land, the merest trifle to sewer rates for five years before 1856, from contributing to the costs of constructing new sewers from which when houses are built the owners would derive all the benefit. The two sections were enacted with a view to the old law. Under the Metropolitan Sewers Act (11 & 12 Vict. c. 112), the area of which is much the same as that of the Acts now in operation for the management of the metropolis, by s. 36, the commissioners might exempt merely agricultural districts from their jurisdiction, and by s. 76, which gives the power to levy rates, the old exemptions were to be observed; so by ss. 163 and 164 of the Metropolis Local Management Act (18 & 19 Vict. c. 120), agricultural land is to be rated at one-fourth of the net value, and the old exemptions as to sewer rates are to be observed.

Brown, Q.C., was heard in reply.

---

been paid for five years, the proviso at the end of s. 53 says that the property shall not be subject to be charged under the provision contained in that section, yet property which had paid sewer rates for five years, though it would be exempt under s. 53, would be liable to the much heavier contribution under s. 52. The only way to avoid this absurdity is to read s. 53 in the way suggested.

CHANNELL, B., concurred.

CLEASBY, B.. I am of the same opinion. This is a street within s. 53.

Judgment for the respondent.

1870

SAWYER v. PADDINGTON.

BLACKBURN, J. I think that the order of the magistrate should be affirmed. The first point in the case is whether that portion of the Harrow Road on which Frankford Terrace abuts is a "new street." The definition of "new street" in s. 112 of 25 & 26 Vict. c. 102, is "all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, or surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out." The definition of "street" is to include the subject-matters specified in s. 250 of 18 & 19 Vict. c. 120, that is to say, "any highway (except the carriageway of any turnpike-road), and any road . . . whether a thoroughfare or not." The Harrow Road, at the time 25 & 26 Vict. c. 102, was passed, was a turnpike-road, and at that time the carriageway had not become a street. After the Act came into operation it ceased to be a turnpike-road, and was taken in charge by the local authorities. It is, therefore, a street, the maintenance of which was, subsequently to the passing of that Act, taken into charge by the local authorities, and is, therefore, clearly a "new street" within the words of the definition.

The second question is, whether s. 52 or s. 53 applies to the present case. It is contended for the appellant, that s. 53 applies to new as well as old streets, and that the proviso as to streets in which sewer rates have been levied for five years prior to the 1st of January, 1856, exempts the appellant's land from liability to contribute to the expense of constructing the sewer; and that the case of *Vestry of St. Giles, Camberwell* v. *Weller* (1), is in his favour, in which the Court of Exchequer decided that the expense of constructing the sewer in a new street where sewer rates had been paid, was to be divided between the adjoining landowners and the rest of the parish. And it must be admitted that if that case were right, inasmuch as sewer rates were levied on the appellant's land more than five years before the 1st of January, 1856, it would be exempt from liability by the proviso.

The effect of this construction of the section would be that, if

(1) See ante, p. 168, n. (1).

meadow land had been subject to sewer rate, however small, for five years before the 1st of January, 1856, and were afterwards built upon, the expense of draining the streets would have to be borne by the whole parish; upon the same principle, land cultivated as a market garden which paid a less rate, or building land lying waste, which was charged little or nothing because of no value, when squares and streets are erected, would also be exempt from the special charge of making the necessary sewer. This would be an inequitable construction of the Act. We must consider the law as it existed up to 1856. What did the legislature then intend? Under 11 & 12 Vict. c. 112, the commissioners of sewers acting within twelve miles of St. Paul's cathedral were united into one body, and jurisdiction was given to them over the whole district, but by s. 36, they were authorized to forbear to exercise their jurisdiction over any place chiefly used for agricultural purposes or which should be in such a state as not to require the exercise of their power; so that they had a discretionary power not to levy rates in part of the Metropolitan district; and by a proviso at the end of s. 76, it is enacted that where lands are exempt from sewer rates the commissioners, in making the rate, shall allow the exemption. It follows from these sections, that the commissioners of sewers had a discretionary power in rating those lands which were rateable; and it was the practice to rate houses much higher than land. Where an old street, therefore, runs through lands where there is no sewer, the legislature thought it would impose a hardship when a sewer was about to be laid down to make the owners of the adjoining houses bear the expense of constructing it, if they had for five years before the 1st of January, 1856, paid sewer rates for houses, and therefore determined, by s. 53, that the expenses should be charged upon the parish at large; and that where rates had been paid for less than five years it would be fair for the vestry to consider how much should be charged upon the houses and how much upon the parish. But if s. 53 also applied to new streets, it would make s. 52 nugatory as to new streets made upon lands in respect of which sewer rates had previously been paid. I think, therefore, that s. 53 applies to streets which are not new, but old, having either no sewer or only an open sewer.

1870

SAWYER v. PADDINGTON.

As, however, the Court of Exchequer have decided to the contrary, and the vestry might have brought an action instead of taking summary proceedings before a magistrate, I think this case ought to be turned into a special case, in which by agreement our judgment may be taken to have been given for the vestry, and the opinion of a court of error may be taken as to the proper construction of these sections; and the costs of this case ought to be costs in the cause.

LUSH, J. I am of the same opinion. I do not wish to add anything on the first point; I have no doubt that this is a new street. Nor should I have any doubt on the second point but for the decision of the Court of Exchequer in *Vestry of St. Giles, Camberwell* v. *Weller* (1), and I do not mean to intimate that I in any way dissent from the judgment of my Brother Blackburn. Section 52 provides for the case where a sewer is constructed in a new street, and in that case the cost of the sewer is to be borne by the owners of the adjoining land; that section having provided for the construction of sewers only in new streets, it was necessary to have a corresponding provision for old streets, because some old streets had no sewers, and s. 53 was enacted with this object. Primâ facie, s. 53 was intended to be supplementary to s. 52, and to apply to streets not regulated by it, and the rates are to be raised in a different manner. The section, however, contains a proviso that no street, in respect of which sewers rates have been levied for five years prior to the 1st of January, 1856, shall be rated under this section. The proviso only exempts streets mentioned in this section, that is, old streets. The Court of Exchequer, in their construction of the Act, have blended the two sections into one, which would make the proviso at the end of s. 53 override both sections. But, in my opinion, the proviso applies only to s. 53, and cannot be read as referring to s. 52. The two sections ought not to be blended together: one applies entirely to new streets, and the other to old streets having either no sewers or only open sewers.

It may be said that it is hard that persons who have paid sewer rates should be called upon to pay for a new sewer when their land

(1) See ante, p. 168, n. (1).

is built upon; but we must assume that the matter was duly considered by the legislature, and that it was not thought expedient to make any difference between land that had paid sewer rate, though in a smaller proportion, and land that had not, but to impose the new liability upon every new street.

Judgment for the respondents.

Attorney for appellant: *T. H. Bartlett.*
Attorneys for respondents: *Fuller & Saltwell.*

THE GRAND JUNCTION CANAL COMPANY, APPELLANTS; THE OVERSEERS OF HEMEL HEMPSTEAD, RESPONDENTS.

Nov. 19.

THE GRAND JUNCTION CANAL COMPANY, APPELLANTS; THE OVERSEERS OF KING'S LANGLEY, RESPONDENTS.

Poor-rate—Canal—"Lands lying near"—Mode of Assessment under 34 *Geo.* 3, *c.* xxiv. *s.* 19.

By 34 Geo. 3, c. xxiv. s. 19, it was provided that a canal company should from time to time be rated to all parliamentary and parochial taxes, in respect of the lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses or other buildings to be erected by the company, in the same proportion as other lands, grounds, and buildings lying near the same, are, or shall be rated, and as the same lands, grounds, and buildings would be rateable in case they were the property of individuals in their natural capacity.

Land was purchased by the company, and the canal was made with towing-paths and lock-houses and buildings attached thereto; subsequently a railway was made on land lying near the canal, running parallel with, and in one place crossing the canal. Buildings were erected on much of the land lying near the canal, and portions of such lands were converted into gardens for watercresses, and otherwise greatly improved in value. In 1848 the company adopted the 8 & 9 Vict. c. 42, and commenced business as carriers on their own account on the canal:—

Held, 1. That the land occupied by the canal was to be rated in the same proportion as the open land lying near, the value of which might be increased from time to time by circumstances; and the buildings belonging to the company in the same proportion as the buildings lying near. 2. That the land occupied by the canal lying near the railway was not to be rated in proportion to the improved value of land with a railway upon it. 3. That the rateable value of the canal under the private Act was not affected by reason of the company carrying on the business of carriers.

Reg. v. *Grand Junction Canal* (7 W. R. 597) and *Reg.* v. *Glamorganshire Canal* (3 E. & E. 186; 29 L. J. (M.C.) 238), discussed.

CASE stated under 12 & 13 Vict. c. 45, s. 11, by consent of parties, by an arbitrator.

1870

GRAND JUNCTION CANAL v. HEMEL HEMPSTEAD.

1 & 2. By 33 Geo. 3, c. lxxx., amended by 34 Geo. 3, c. xxiv., certain persons were incorporated into a joint stock company, by the name of "The Company of Proprietors of the Grand Junction Canal."

3. By s. 19 of the amending statute "The company of proprietors shall from time to time be rated to all parliamentary and parochial taxes and assessments for and in respect of the lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses or other buildings to be erected by the company of proprietors, in pursuance of the recited Act and this Act, in the same proportion as other lands, grounds, and buildings lying near the same are or shall be rated, and as the same lands, grounds, and buildings so purchased or taken, or to be purchased or taken, and erected, would be rateable in case the same were the property of individuals in their natural capacity."

4. By 36 Geo. 3, c. xxv., "An Act to enable the company of proprietors of the Grand Junction Canal to finish and complete the same, &c., s. 7, "All parochial rates and assessments which shall or may at any time be laid, assessed, or imposed upon the lands and personal estate of the said company of proprietors, shall be in each parish, township, hamlet, or place respectively in proportion to the length of the canal and cuts respectively.

5. By these Acts all necessary powers were given to the company to take, hold, and use lands, and erect buildings for the purposes of the company, and to make and maintain the canal and cuts, which have been duly exercised by the company.

6. The canal has long since been made, and a portion thereof, and the towing-path and lock-houses attached thereto, cover and occupy 19*a.* 1*r.* of land, and is of the length of two miles four furlongs, in the parish of Hemel Hempstead, which lands were purchased by the company under the above Acts.

7. Another portion of the canal, and the locks and buildings attached thereto, cover and occupy 18*a.* 2*r.*, and is of the length of two miles and two furlongs, in the parish of King's Langley, which lands were also purchased by the company, under the private statutes, and for the purposes of the company.

8. In the year 1848 the canal company adopted the provisions of 8 & 9 Vict. c. 42, and commenced business as carriers on their own account on the canal, and have from that time exercised

all the powers given by s. 1 of that statute for the purpose of carrying on the trade or business of carriers, and for such trade or business the company have a tariff of freights and charges different from the tolls chargeable by their private Act.

9. Lock-houses and toll-houses have been erected on the lands of the company for the purposes of their business.

10. In 1836, an Act was obtained for making a railway from London to Birmingham, which runs parallel with the canal through the parishes at various distances from the canal, not exceeding 300 yards at the farthest point, at one place crossing the canal, which railway is assessed to the poor-rates at 2000*l.* per mile.

11. Buildings have been erected on much of the land lying near to the canal, and portions of such lands have been converted into gardens for watercresses and otherwise greatly improved in value.

12. On the 8th of January, 1867, a poor-rate for the parish of Hemel Hempstead, was made, and in it the company were rated in respect of the lands, tenements, and hereditaments in the parish at the net rateable value of 200*l.*,

13. On the 7th of February, 1867, a poor-rate for the parish of King's Langley was made, and in it the company were rated upon the net rateable value of 196*l.* in respect of the lands, tenements, and hereditaments in the parish.

14. The company, on the 6th of July, 1867, duly objected before the assessment committee of the Hemel Hempstead union, in which union both of the parishes are included, to the valuation lists respectively, upon the grounds of unfairness and incorrectness, and that in particular the lands, tenements, and hereditaments of the company in the respective parishes were not valued and assessed in the valuation lists respectively, according to the provisions of the private statutes, but the company failed to obtain such relief as they deemed just.

15. Notices of appeal were duly served, upon which it was agreed to state this case.

The questions for the opinion of the Court were:—

1. Whether the company is liable to be assessed to the poor-rates at the value of the lands, buildings, and premises as improved by reason of the business of carriers carried on by the appellants?

2. What is the legal construction of "lying near" to the canal?

1870

GRAND JUNCTION CANAL v. HEMEL HEMPSTEAD.

3. Whether, in estimating the value of the land over which the railway runs, the value of the site only is to be estimated as being lands, grounds, and buildings; or is such site to be estimated at its improved value as a railway?

4. Are the lands lying near to the canal upon which buildings have been erected to be estimated at the value only of the sites of such buildings; or is the value of such buildings to be estimated?

5. Are the lands lying near to the canal which have been improved by their conversion into gardens, or otherwise, to be estimated at their improved value, or as agricultural land only?

6. In estimating the value at which the premises of the appellants are to be assessed in proportion to the lands, grounds, and buildings lying near thereto, are all such lands, grounds, and buildings to be thrown into hotchpot, and the entire of the premises of the appellants to be assessed at the average rating value of the whole of such lands, grounds, and buildings; or is each portion of appellants' premises to be assessed only in proportion to the rating value of so much of the lands, grounds, and buildings as is lying next to such portion of appellants' premises?

7. Whether, in estimating the value at which the premises of the appellants are to be assessed, the proportion which, by s. 19, such assessment is to bear to the lands, grounds, and buildings lying near to the canal is to be distributive; that is, whether the land of the appellants is to be assessed in the same proportion as the land lying near, and the buildings of the appellants as the buildings lying near; or whether all the premises of the appellants are to be assessed as a whole in proportion to the aggregate rating value of all the lands, grounds, and buildings lying near?

Manisty, Q.C. (*Bush Cooper* with him), for the appellants. As to the first point, 8 & 9 Vict. c. 42, merely authorizes canal companies to carry as common carriers. That Act has no clauses in any way inconsistent with s. 19 of 34 Geo. 3, c. xxiv. The other points all turn upon the construction of s. 19, which has received judicial interpretation in *Rex* v. *Grand Junction Canal* (1), and *Reg* v. *Grand Junction Canal* (2). It is there laid down that the land of the canal is to be rated as if it had never been appropriated to the

(1) 1 B. & A. 289. (2) 7 W. R. 597.

canal, but had remained open land in the hands of individuals. The canal ought to be rated according to the value of the land near the canal in its natural state, but with the reflected value of such land improved by its being used for the purposes of market-gardens, or such like profitable purposes, but still as land. It ought not to be rated at the artificial value of land with a railway upon it. The words of s. 19 must be taken distributively; that is, the lands of the appellants are to be assessed in the same proportion as other lands lying near, and their buildings in the same proportion as other buildings lying near. *Reg.* v. *Glamorganshire Canal* (1) can be distinguished, because in the statute upon which that case was decided the word "buildings" does not occur. It is admitted that "lying near" must mean in the neighbourhood, and not lying nearest to the canal.

Sir J. B. Karslake, Q.C. (*Tayler* with him), for the respondents. As to the first point, 8 & 9 Vict. c. 42, by making canal companies common carriers, has placed the appellants in the same position as railway companies, and they are now allowed to use their canal in the most beneficial manner. By a change of circumstances the clauses in their private Acts with regard to rating are repealed, and they ought now to be rated in the same manner as railway companies. Secondly, if the clauses are not repealed, then the appellants' land and buildings must be rated as pointed out in *Reg.* v. *Glamorganshire Canal.* (1) It was there held that the whole of the land ought not to be rated as mere land, but that the land covered with buildings should be brought into hotchpot with the lands of the other description in each particular parish, and the land occupied by the canal should be rated according to the aggregate value of the whole. The Court disapproved of the rule laid down in *Reg.* v. *Grand Junction Canal* (2), which is, in effect, the contention of the appellants. It is said that the statute in the present case contains the word "buildings," but in principle that makes no difference. The portion of the canal which is near the railway must be rated in the same proportion as the land which has the railway upon it. The land does not cease to be land because it is used as a railway, or because it is

(1) 3 E. & E. 186; 29 L. J. (M.C.) 238. (2) 7 W. R. 597.

1870

GRAND JUNCTION CANAL v. HEMEL HEMPSTEAD.

covered with buildings, or used as a market-garden, or put to any other profitable use. The land occupied by the canal is to be rated upon the average value of the lands of every description lying near. If the land is deteriorated in value, the appellants will have the benefit; if increased in value, the parish will have the benefit. The words of s. 19 are, "in the same proportion as other lands, grounds, and buildings lying near the same are or shall be rated." No effect can be given to those words unless the lands are to be estimated as their value varies from time to time.

[MELLOR, J. We are all of opinion that, by the adoption of 8 & 9 Vict. c. 42, there is no repeal of the rating clauses of 34 Geo. 3, c. xxiv.; and also that the land occupied by the canal lying near to the railway is not to be rated in proportion to the improved value of land with a railway upon it.]

Manisty, Q.C., in reply. *Reg.* v. *Grand Junction Canal* (1) is perfectly right, and was misunderstood by the Court in *Reg.* v. *Glamorganshire Canal.* (2)

MELLOR, J. The only remaining point upon which we have to deliver judgment is upon the construction of s. 19. If this case were identical with *Reg.* v. *Glamorganshire Canal* (2), I should have considered myself bound by that case, but there is an essential distinction between that case and the present. The statute there provided that the assessment in respect of the lands and grounds taken for the purposes of the canal should be made in the same proportion as that of other lands and grounds lying near the same, the word "buildings" being omitted. It appeared, however, that a considerable portion of the adjoining land had become covered with buildings, and in order to ascertain the rateable value of the lands occupied by the canal, it was necessary to bring the open land and the land covered with buildings into hotchpot, and rate the lands occupied by the canal according to the aggregate value of the whole of such land. It is true that Cockburn, C.J., in *Reg.* v. *Glamorganshire Canal* (2) seems to have disapproved of the decision of Lord Campbell, C.J. and Erle, J., in *Reg.* v. *Grand Junction Canal* (1); but I think that there is a distinction between the two cases. I do not

(1) 7 W. R. 597. (2) 3 E. & E. 186; 29 L. J. (M.C.) 238.

6 Jur. N.S. 1146

think that Lord Campbell, C.J., and Erle, J., intended to say that the land occupied by the canal was always to be rated at the value of purely agricultural land, which Cockburn, C.J., in *Reg.* v. *Glamorganshire Canal* (1) appears to have thought they intended, but at the increased value of surrounding land as determined from time to time by circumstances. If the land lying near becomes of more value by a new mode of cultivation being adopted, or by a different use being made of it as being used as a market-garden, or by buildings being erected in the neighbourhood, then the rateable value of the canal will be determined by the increased rateable value of the land lying near. In s. 19 it is enacted that the assessments in respect of lands and grounds taken, and all warehouses and other buildings to be erected, are to be made in the same proportion as other lands, grounds, and buildings lying near the same. Here the word "lands" appears expressly to regulate the rating of lands, and we cannot interpret the word "lands" to mean lands covered with buildings, because we find the word "buildings" used in order to regulate the rating of buildings. I think, therefore, in assessing the rateable value of the canal that the reflected value of the land lying near, varying from time to time according to circumstances, is to be the measure of the rateable value of the lands belonging to the appellants; and in the same way the value of neighbouring buildings is to regulate the rating of the appellants' buildings. I think that this is the true interpretation of s. 19. Our judgment, as I have said, does not conflict with the decision in *Reg.* v. *Glamorganshire Canal* (1), as the present case is distinguishable on the ground that the word "buildings" is used.

LUSH, J. I am of the same opinion. The question for our decision is whether the bed of the canal is to be rated as if it were land covered with buildings, or as if it were open land. The question turns upon s. 19 of 34 Geo. 3, c. xxiv., which is set out in par. 3 of the case. I think the meaning of the language in that section is, that, for the purpose of rating, it is always to be assumed that the bed of the canal is open land, and not land covered with buildings, and that whatever buildings are erected

(1) 3 E. & E. 186; 29 L. J. (M.C.) 238.

1870

GRAND JUNCTION CANAL v. HEMEL HEMPSTEAD.

by the appellants are to be rated as buildings; each being rated according to the respective value of each in the neighbourhood. The bed of the canal, being assumed to be open land for the purposes of rating, would no doubt be enhanced in value by reason of the erection of buildings in the neighbourhood, and the rate should be made upon such increased value. I agree with my Brother Mellor, that the language of the statute in this case differs from that of the statute upon which the Court gave judgment in *Reg.* v. *Glamorganshire Canal* (1). There the word "buildings" was omitted, and the word "lands" was evidently used to denote land of every description, whether covered with buildings or not. This distinguishes that case from the present. I also agree with my Brother Mellor, that if it were intended to be laid down in *Reg.* v. *Grand Junction Canal* (2), that the land which comprises the bed of the canal is for all time to be treated as purely agricultural land, that would not be the correct interpretation of the Act. I do not think the Court so intended. In my opinion the bed of the canal is to be rated as if it were open land not covered with buildings, but which might from time to time be increased in value.

HANNEN, J., concurred.

Judgment for the appellants accordingly.

Attorneys for appellants: *Walker & Jerwood.*

Attorneys for respondents: *Eldred & Andrew, for Grover, Son, & Stocken, Hemel Hempstead.*

(1) 3 E. & E. 186; 29 L. J. (M.C.) 238. (2) 7 W. R. 597.

HIRST, APPELLANT; THE LOCAL BOARD OF HEALTH OF HALIFAX, RESPONDENTS. 1870 *Nov.* 16.

Public Health Acts, 1848 & 1852 (11 & 12 *Vict. c.* 63, *s.* 69; 15 & 16 *Vict. c.* 42, *s.* 13)—"*Highway repairable by the Inhabitants at Large.*"—*Effect of Local Statutes.*

7 QB 191

By a local Act (8 Geo. 3, c. 44) for paving and lighting the town of H., trustees were appointed with power to cause the streets, &c., to be paved, repaired and lighted, and to levy rates for the purpose on the tenants and occupiers of all houses, &c., within the township; and all persons paying the rates were exempted and discharged from all other charges of paving or lighting the streets.

While this Act was in operation in 1816 a new street was set out on private property connecting two highways; and in 1819 it was passable for carriages, and had been open to and used by the public ever since.

In 1823 this Act was repealed by 4 Geo. 4, c. xc.; and by that Act trustees were appointed, and all persons were exonerated from statute duty for the repairs of the public highways within the town, and from payment of any composition in lieu thereof, and from all liability by law to be called upon for the repairs of such highways; the surveyors under the Act were to have all the rights, duties, and obligations of surveyors of highways, and all indictments and other legal process for non-repair of the roads, &c., were to be brought against the trustees. The trustees were empowered to cause the present and future streets, &c., to be paved, &c.; and when any new streets already laid out, or which should thereafter be laid out, should be sufficiently paved and put in good repair, the trustees had power, on application of the adjoining owners, to declare the same public streets, and they were afterwards to be kept in repair by the trustees; and where any streets, which then were or thereafter should be set out on private property, should have been open to and used by the public for three successive years, the trustees might cause them to be paved, &c., and afterwards such streets were to be deemed to be public streets, and kept in repair by the trustees.

The street had never been paved, nor declared public by the trustees; and up to 1851, though the houses in it had been from time to time rated under the local Acts, the trustees had not repaired it, nor had the expenses of any repairs been paid out of the parochial district or other rates, nor by the inhabitants of the township or district.

In 1851 the Public Health Act, 1848, was applied to the district; and the Local Board of Health proceeded under s. 69 to pave the street, and charged the expense on the adjoining landowners:—

Held, that the street came within the exception in s. 69 as interpreted by 15 & 16 Vict. c. 42, s. 13, of a "highway repairable by the inhabitants at large": for that there was nothing in the first local Act to prevent a street becoming a highway by dedication and user; that the street had, therefore, become a highway repairable by the inhabitants at large before 1823; and that

1870

HIRST v. HALIFAX LOCAL BOARD.

the second local Act only applied to streets then in progress or afterwards laid out, and had no effect on streets already public.

Wallington v. *White* (10 C. B. (N.S.) 128; 30 L. J. (M.C.) 209; 13 C. B. (N.S.) 865; 32 L. J. (C.P.) 86) distinguished.

CASE stated by Justices of Halifax under 20 & 21 Vict. c. 43.

In 1851 the borough of Halifax was created a district for the purposes of the Public Health Act, 1848 (11 & 12 Vict. c. 63); and the Local Government Act, 1858 (21 & 22 Vict. c. 98) took effect in the district from the 1st of September, 1858.

After the 1st of September, 1858, the street or road called "High Street" in the township and district of Halifax was not sewered, levelled, paved, flagged, &c., to the satisfaction of the local board of health; and they gave the necessary notices to the owners of adjoining property, amongst others to the appellant, under s. 69 of 11 & 12 Vict. c. 63 (1); and the notices not being complied with, the board did the work themselves, and charged the expenses to the owners, the appellant's share being 34*l.*; and that sum not being paid, a complaint was preferred against the appellant on the 6th of April, 1869.

Upon the facts proved at the hearing it appeared, that if the street or road was not a highway within the meaning of the exception in s. 69 of the Public Health Act, 1848, the appellant was liable to the payment of the 34*l.*

In the year 1816 there were two streets or roads within the township of Halifax called respectively King Cross Street and Bull Close Lane, both of which were public highways. About that time one Thomas Aked set out a close of land, being private property, lying between the public highways, in lots, partly for building purposes, and on other part set out a new street or road now called High Street, being the street in question; running across from King Cross Street to Bull Close Lane and connecting those two streets.

Though set out as aforesaid, High Street was not, before the passing of 4 Geo. 4, c. xc., hereafter mentioned, paved, set, or otherwise paved or completed, nor was this done till the board of health dealt with it under s. 69 of the Public Health Act. It

(1) The section is given, ante, p. 128, n.

1870

HIRST v. HALIFAX LOCAL BOARD.

was, however, passable for carriages in 1819, and has been open to and used by the public ever since.

In 1768 an Act of Parliament (8 Geo. 3, c. 44, Local and Personal) was passed, intituled, "An Act to amend and render more effectual an Act of 2 Geo. 3 for supplying the town of Halifax with water, and for better paving, cleansing, and lighting the streets."

By s. 1 trustees were appointed for executing the Act. By s. 17 the trustees or any five of them had power from time to time to cause, order, and direct the streets, greens, lanes, alleys, passages, and other places within the town to be paved, repaired, raised, sunk, or altered, and also to cause, &c., the same to be cleansed and lighted as they should think fit.

By s. 39, for defraying the expenses of repairing the said streets, &c., and of cleansing and lighting the same, and other the purposes of the Act, one or more rates or assessments were to be made once in every year, or oftener, if thought needful by the trustees, or any seven or more of them, upon every tenant or occupier of any house, shop, warehouse, cellar, vault, yard, frontsteads, or other tenement of the yearly value of 40*s.* or upwards, within the town, not to exceed in the whole 2*s.* in the pound in any one year of the yearly rent or yearly value of such houses, &c. By s. 41 the rates were to be enforced by summary proceedings.

By s. 45: "All and every person or persons paying the said rates and assessments for paving, cleansing, and lighting, as aforesaid, by this Act laid or to be laid, shall be, and they and every one of them is and are hereby exempted and discharged from all other charges and expenses of paving, cleansing, or lighting the said streets, greens, lanes, alleys, passages, and places, or any part or parts thereof, and all other streets, lanes, alleys, and places within the town, and also from all penalties which may or might be incurred by reason or means of their neglecting to pave, cleanse, or light the same respectively, any law, statute, or usage to the contrary notwithstanding; and as soon as any rate or assessment shall be laid, made, or assessed by virtue of this Act on the tenants or occupiers of any houses, shops, warehouses, cellars, vaults, yards, frontsteads, or other tenements, for the purpose of paving, cleansing, and lighting the said streets, &c., such owners or occupiers respectively shall be no longer liable to be charged to any other rate or assessment for the like purpose on account of such houses or other tenements."

The 8 Geo. 3, c. 44, continued in force until the 17th of June, 1823, when it was repealed by 4 Geo. 4, c. xc., intituled, "An Act for paving, lighting, cleansing, watching, and improving the township of Halifax, and for supplying the same with water."

1870

HIRST v. HALIFAX LOCAL BOARD.

By that Act trustees were appointed for carrying it into execution.

By s. 21: "From and after the passing of this Act, all and every persons and person shall be, and they are hereby exonerated, released, and for ever discharged from the performance of statute duty for the repairs of the public highways within the said township, and from the payment of any composition for the same in lieu thereof, and from all liability by law to be called upon for the repair of such highways; provided always, that the surveyor or surveyors to be continued or appointed under or by virtue of this Act, shall be, and he or they is or are hereby invested with, and made subject and liable to, all and every the rights, liberties, powers, authorities, duties, penalties, and obligations in respect of the streets, lanes, roads, ways, and other public places within the said township, which by law now are or hereafter shall or may be granted to, or conferred or imposed upon, the surveyors of the public highways, within that part of Great Britain called England, and all moneys, costs, and charges which any such surveyor or surveyors shall pay or be subjected to in the execution of the duties of his or their office or offices, shall be paid by the said trustees or their treasurer, out of the improvement rates, to be by them or him received by virtue of this Act; and all indictments and other processes of law which may be brought for or on account of the repair or non-repair of the streets, roads, and ways, within the said township, shall be brought against the trustees, or any one or more of them, and the same shall be as good, valid, and effectual as if brought against the whole of such trustees."

By s. 22: "It shall and may be lawful to and for the trustees, and they are hereby authorized, empowered, and required from time to time, when, and so often, and in such manner as they shall think proper and necessary, to cause the present and the future streets, lanes, roads, passages, and other public places, as well carriage as footways, within the said township, and each and every of them, and each and every or any part or parts thereof respectively, to be paved, flagged, or otherwise repaired and amended, and the same, and the pavements, flagging, and other materials thereof, to be taken up and relaid, and the ground or soil thereof to be raised, lowered, or altered, from time to time, and in such manner and with such materials as they, the said trustees, shall think fit; and to erect, or set up, or cause to be erected or set up, any posts, rails, pales, or fences in or near any place or places which they, the said trustees, shall think proper for the better security of passengers, cattle, or carriages, or of the said pavements or curbstones, from damage by waggons, carts, or other carriages: Provided always, that nothing in this Act contained shall extend, or be construed to extend, to release, exonerate, or discharge the trustees, or commissioners of the several turnpike roads and bridges within the said township, or the tolls respectively arising therefrom from the custom or liability to which they have been or may be exposed, of repairing, or maintaining, or contributing to the repair or maintenance of so much of the same roads and bridges as lies within the said township."

By s. 23: "When any of the new streets, roads, and ways, within the said township, already laid out and made, or which shall hereafter be laid out and made, shall be well and sufficiently paved, stoned, or otherwise put in good order and repair, and when public drains shall be made and completed therein to the satisfaction of the said trustees, it shall and may be lawful for the said trustees, from time to time, on application of the owner or owners, and occupier or occu-

piers, of the several messuages, buildings, lands, and tenements respectively, adjoining each of such streets, roads, or ways, or a majority in number of such owners or occupiers respectively, and they are hereby empowered by any writing under their hands, or the hands of any of or more of them, to declare the same to be public streets, roads, and ways; and from and after such declaration made, and after publication thereof, by notice to be given in manner by this Act directed, such new streets, roads, and ways, and every of them, shall be deemed and taken to be public streets, roads, and ways, to all intents and purposes, and they shall be repaired and kept in repair by the said trustees, under the provisions of this Act.

By s. 24: "In every case where any streets, roads, or ways, which now are or hereafter shall or may be set out on private property, within the said township, shall have been open to and used by the public for the space of three successive years, it shall be lawful for the said trustees, and they are hereby empowered to cause to be paved, set, or otherwise made and completed, such streets, roads, or ways respectively, and to cause to be cut or made in, through, over, under, or adjoining the same, such tunnels, gutters, sinks, drains, ditches, sewers, or watercourses, as to them shall seem necessary; and from and after such last-mentioned streets, roads, or ways, shall have been so paved or set, or otherwise made and completed, and such tunnels, gutters, sinks, drains, ditches, sewers, or watercourses, so cut or made and completed as aforesaid, the same streets, roads, or ways respectively, shall be deemed and taken to be public streets, roads, and ways, to all intents and purposes, and shall thenceforth be repaired and kept in repair by the said trustees under the powers and provisions of this Act."

By s. 25: "The costs, charges, and expenses of the works so to be done or executed by or by order of the said trustees (such costs, charges, and expenses being first ascertained by any justice or justices of the peace for the West Riding, and by him or them settled and apportioned according to the relative rent or value of the respective messuages, buildings, lands, or tenements in such respective streets, roads, or ways) shall be reimbursed to such trustees by the owner or owners, or occupier or occupiers of the messuages, buildings, lands, or tenements adjoining the said streets, roads, or ways; and in case of non-payment of such costs, charges, and expenses, within fourteen days after the same shall have been demanded by or on behalf of the said trustees, the same shall be levied by distress and sale of the goods and chattels of such owner or owners, or occupier or occupiers, by warrant under the hand and seal, or hands and seals, of any justice or justices of the peace for the said West Riding, together with the expenses of such distress and sale, returning the overplus (if any) to such owner or owners, or occupier or occupiers," with a proviso that the occupiers may deduct what they have been compelled to pay from their rent, &c.

By s. 99, powers are given to the trustees to make and levy rates within their district for the purpose, amongst other things, of carrying the above enactments into execution, which rates were to be assessed on the tenants or occupiers of the several houses, &c., and other buildings, erections, works, lands, tenements and other hereditaments within the township, according to the annual rent

1870

HIRST v. HALIFAX LOCAL BOARD.

or value of the same respectively, not exceeding in any one year the sum of 2*s.* 6*d.* in the pound upon such annual rent or value.

The Act of 1823 continued in force till the year 1851, when, by the provisional order of the General Board of Health, applying the Public Health Act, 1848, confirmed by the Supplemental Act, 1851 (14 & 15 Vict. c. 103) the proviso in s. 21 of the Act of 1823, beginning with the words "Provided always that the surveyor," and going down to the end of the section, and ss. 22 and 25 were repealed; but the rest of s. 21 and ss. 23 and 24 were left in operation.

Prior and up to 1851 the costs of repairing the several highways repaired by the trustees within the township of Halifax were defrayed by rates made and levied under the Acts of 1768 and 1823 respectively. After the application of the Public Health Act to the district such expenses have been charged to and levied by a general district rate under the provisions of that Act.

The trustees under the local Act of 1823 did not at any time declare High Street to be a public street, road, or way, nor was any application ever made to them to do so pursuant to the provisions of s. 23; nor did the trustees avail themselves of the provisions either of s. 24 or 25 of that Act with reference to the street.

The houses in High Street were from time to time rated or assessed by the trustees under the provisions of the local Acts of 1768 and 1823, prior to 1851, and were respectively above the yearly value of 40*s.* No notice was given at any time after the passing of 5 & 6 Wm. 4, c. 50 of any intention to dedicate High Street to the public, nor was any certificate granted by two justices or inrolled at the quarter sessions as directed by that Act; and the local board did not at any time before the execution of the works as before mentioned declare High Street to be a highway under s. 70 of the Public Health Act, 1848. Up to the time of the execution of the works by the local board, under the provisions of s. 69 of the Public Health Act, 1848, neither the trustees nor the local board of health, nor the appellant, ever repaired the street nor any part thereof, nor had the expenses of any such repairs or works, &c., been borne or paid out of any parochial district or other rates or assessments, or by the inhabitants of the parish or township or district of Halifax.

1870

HIRST v. HALIFAX LOCAL BOARD.

Upon these facts it was contended by the respondents that the street was not a highway within the exception in s. 69 of the Public Health Act, 1848, and the Acts amending the same.

On the part of the appellant it was contended that the street or road became a highway at some time between the year 1819 and the coming into operation of 5 & 6 Wm. 4, c. 50, by dedication to and adoption and user by the public, and is a "highway" within the meaning of s. 69 of the Public Health Act, 1848, which, by s. 13 of 15 & 16 Vict. c. 42, means "any highway repairable by the inhabitants at large."

The justices being of opinion that the street was not a "highway," made an order for payment of the 34*l.*

If the Court should be of opinion that the decision of the justices was right, their order for payment was to stand good; if not, the information was to be dismissed.

Maule, Q.C. (*Kemplay* with him), for the appellant. The question is simply whether High Street was in 1851, when the Public Health Act, 1848, was applied to Halifax, a "highway repairable by the inhabitants at large," so as to be within the exception in s. 69, as interpreted by s. 13 of 15 & 16 Vict. c. 42. If it was, the appellant is not liable as an adjoining owner for the expenses of paving it. Now the street was laid out as long ago as 1816, and in 1819 it was passable for carriages, and it has been open to and used by the public ever since. It therefore became a highway, and as a matter of course repairable by the parish or township, some time between 1819 and 1823, when the second Local Act, 4 Geo. 4, c. xc. passed, unless there is anything in the former Act, 8 Geo. 3, c. 44, to prevent the operation of the common law. Section 45 is the only section at all bearing on the point, and that only exempts the occupiers of houses, &c., from all other charges for paving and lighting the streets; but it leaves untouched the common law duty of the parish at large to repair its highways. Consequently it must be taken that before 1823 this street had become a highway repairable by the township at large by dedication and user. *Wallington* v. *White* (1) will be

(1) 10 C. B. (N.S.) 128; 30 L. J. (M.C.) 209; S. C. in Ex. Ch. nom. *Willes* v. *Wallington*, 13 C. B. (N.S.) 865; 32 L. J. (C.P.) 86.

1870

HIRST v. HALIFAX LOCAL BOARD.

relied on by the respondents; and no doubt if the street had not become a highway before 1823, that case would be directly in point, as the clauses in the Act there in question are very similar to those of 4 Geo. 4, c. cx.; but in 8 Geo. 3, c. 44, there is no clause requiring the adoption by the trustees as a condition precedent to a street becoming public and repairable by the township at large; whereas the presence of such a clause was the ground of the decision of the Court of Common Pleas. Again 4 Geo. 4, c. cx. leaves matters as they were as to streets already public. Section 21 leaves the liability to repair the public streets in the township at large, only altering the fund from the old highway rate to rates imposed under the Act; true it directs that indictments shall be brought against the trustees; but this is only simplifying the procedure, and leaves the liability in the inhabitants at large; and it expressly puts the surveyor under the Act in the same position as the old surveyors of highways.

[LUSH, J. Section 24 is the section that will be relied upon by the respondents.]

That cannot be intended to be retrospective. Similar expressions in s. 23 of the General Highway Act (5 & 6 Wm. 4, c. 50) have been interpreted to be prospective, and to apply only to highways in the course of being laid out, and not to roads which have already become highways: *Reg.* v. *Westmark* (1).

Cohen, for the respondents. Under the Act of 1768 all liability for repairs at common law was abolished by s. 39, which imposed a new rate, and by s. 45, which abolished all liability to any other rate. It is true that, in *Rex* v. *Netherthong* (2), the imposition of a new liability was held not per se to abolish the old; but in that case the old liability was expressly reserved. No doubt, there is no clause in the first Act requiring the trustees to declare a street public as there was in *Wallington* v. *White* (3); but the decision in that case, as is clear from the judgments of Erle, C.J., and Byles, J., was mainly based on the ground that the exemption from all liability to highway rates had made the highway no longer repairable by the inhabitants at large. It is clear that s. 69 of the Public Health Act, 1848, applies to existing streets not

(1) 2 Mood. & Rob. 305.
(2) 2 B. & Ald. 179.
(3) 10 C. B. (N.S.) 128; 30 L. J. (M.C.) 209.

1870

HIRST v. HALIFAX LOCAL BOARD.

repairable by the parish, which like the present have never been paved, and not merely to new streets: *Hull Local Board* v. *Jones* (1). And the policy of the legislature is to throw the expense of paving in the first instance on the owners of the adjoining houses. At common law the parish was not bound to pave, but only to keep the highways in reasonable repair; and the legislature did not intend to extend the liability of the parish in the first instance. Secondly, whatever was the position of matters in 1823, the old Act was then repealed by 4 Geo. 4, c. cx.; and by s. 21 of that Act all liability to statute labour and to all other rates is to cease on the payment of rates under the Act. It is very similar to s. 27 of the Act on which the Court of Common Pleas based their decision (2). Therefore, if that section stood alone, it would be sufficient to have made this street cease to be a highway repairable by the inhabitants at large. But s. 24 is still stronger; by that section "in every case where any streets, which now are" (as this street was), "or hereafter shall be set out on private property, shall have been open for three successive years," the trustees may cause them to be paved at the expense of the owners of the house (see s. 25). And it is not till after they are paved that they are to be deemed and taken to be public streets to be repaired by the trustees. All the sections are reconciled by making s. 24 apply to all streets on private property, though, no doubt, the construction put in *Reg.* v. *Westmark* (3) on s. 23 of the Highway Act is to the contrary; but that is a very forced construction, and only adopted by Maule, J., on the ground of the inconvenience of the other construction; but as to streets in a town the inconvenience is the other way. Thus s. 22 applies to streets already paved, for the paving and repair of which the township is to be liable: s. 23 to new streets not on private property, which, after they have been properly paved, may be declared public by the trustees, and are afterwards to be repaired by the township: and s. 24 applies to all streets on private property, which, not having been paved, have still been used by the public for three years, for these the township is not to be liable until they have been paved by the owners. That is the position of "High

(1) 1 H. & N. 489; 26 L. J. (Ex.) 33.

(2) See 10 C. B. (N.S.) at pp. 136, 137.

(3) 2 Mood. & Rob. 305.

1870

HIRST v. HALIFAX LOCAL BOARD.

Street," and, therefore, in 1851 it was not a highway repairable by the inhabitants at large.

[LUSH, J. By s. 99 there is a general rate imposed on all property in the township.]

No doubt, as under s. 39 of the old Act, because all streets already paved, and all streets declared public, are to be maintained in repair by the township at large.

[LUSH, J. By s. 99 there is what may be called a new general highway rate imposed; by ss. 21 and 22, the liability to the old highway rate is taken away; but the public streets or highways are still repairable by the township or inhabitants at large; and by s. 21 the liability is to be enforced against the trustees, as representing the inhabitants.]

Maule, Q.C., in reply. In the Act of 1768, there was no clause modifying the effect of dedication and user, by requiring the adoption by the trustees to be declared; consequently the decision of the Common Pleas does not apply; and the street had become a highway in 1823, repairable by the inhabitants at large, and it remained so up to 1851; for although no repairs may have been done, there remained a general fund, although altered in character, applicable to the repairs of the highway.

MELLOR, J. I think our judgment must be for the appellant. It is not always easy to see the object of particular legislation, but our duty is to endeavour to construe the enactments according to what appears to be their effect and meaning; and under the statutes now in question, what we have to decide is, whether this street was a "highway repairable by the inhabitants at large" upon the facts stated in the case. It was a street set out in 1816, and it opened a communication between two admitted highways, it had never been paved or flagged, but it had been dedicated and adopted, at all events, it had been used generally by the public for four or five years from 1819, and, consequently, it had primâ facie become a highway at the time the Act of 1823 was passed. It is true no highway rate proper was levied, but the authorities were entitled to levy a rate, and though they did not in the interval up to 1823 do anything to the street, it had become repairable by the township; and I do not see anything inequitable in that, the town-

ship had the benefit of the assessment on all the property in the street; and there is no reason why it should not now be paved and put in proper order at the expense of the district at large. Then there is nothing in the local Acts to prevent the street from having become a highway, or to shew that it had ceased to be a highway. In the old Act there is nothing requiring the adoption by the authorities before a street or road could become a highway. The provisions of the later Act exhibit a different policy, and the old Act was repealed; but the provisions of the new Act do not affect this street any more than any other admitted highway. It appears to me, therefore, that this street comes within the exception in s. 69, and consequently the order was wrongly made on the appellant.

LUSH, J. I am of the same opinion. The case depends on s. 69 of the Public Health Act, 1848. The local board of health have taken all the proper steps, and the appellant sets up the exception, and the simple question is, was this in 1851 "a highway repairable by the inhabitants at large?" What are the facts? The street was set out in 1816, and from 1819 downwards it was passable for carriages, and it has been open to and used by the public ever since, and long before the General Highway Act (5 & 6 Wm. 4, c. 50, s. 23) gave a discretion to the vestry of a parish to adopt or refuse the dedication of a highway. This street, therefore, became a highway repairable by the inhabitants at large, unless there is something in the local Act to prevent the operation of the common law, which was then in force, from giving effect to the dedication and making the inhabitants liable to the repair. The Act of 1768 (8 Geo. 3, c. 44), gives power to the trustees to pave and light all the streets of the town, and it further gives power to them to levy rates for the purposes of the Act on all the property in the town, and exempts all persons paying such rates from all other charges for paving and lighting the streets. That may, possibly, exempt the occupiers from liability to statute duty or to rates leviable at common law; but there is nothing to prevent the common law liability of the parish attaching on the dedication of a highway. Therefore, so far as this Act is concerned, it appears that in 1823, this street had already become a highway repairable

1870

HIRST v. HALIFAX LOCAL BOARD.

by the inhabitants at large. In 1823 that Act was repealed by 4 Geo. 4, c. xc. Section 21 of the new Act seems to have much the same effect (though in wider terms) as the exempting clause of the former Act; for it expressly takes away all liability to statute duty, and all liability to be called upon for repair of highways at common law; but the proviso places the surveyors under the Act in the same position as the surveyors of any parish; and it is clear that the township is not to be exonerated from liability, all that is done is that an indictment for the non-repair is to be brought against the trustees, as more convenient than against the inhabitants. The rates are to be raised in a particular way (as pointed out in s. 99), and all personal liability of the inhabitants is taken away; but that is all. Section 22 gives power to the trustees to do all necessary paving and other repairs. Section 23 enacts that when any new streets already laid out, or which shall hereafter be laid out and made, shall be paved, the trustees may declare the same to be public streets. And s. 24 enacts that when any streets, which now are or hereafter shall be set out on private property, shall have been open to the public for three successive years, the trustees may pave them, and they shall afterwards be deemed public streets. But this enactment, it is pretty clear, cannot be construed to have any retrospective effect, so as to deprive a confessedly public road of that character; but must be construed as prospective only, "Now are set out," must mean, in the course of formation and set out at the time of the passing of the Act, as was held in *Reg.* v. *Westmark* (1), under similar words in s. 23 of the General Highway Act, 5 & 6 Wm. 4, c. 50. I agree if the second Act had been passed before this street had become a highway, the case would have been exactly analogous to *Wallington* v. *White* (2). There the road was opened subject to a clause preventing it becoming a highway until the trustees had elected to take it, the same discretion being vested in the trustees by the local Act as was subsequently vested in the vestry by the General Highway Act. But, in the present case there was nothing in the original Act to prevent a road becoming a highway by

(1) 2 Mood. & Rob. 305.

(2) 10 C. B. (N.S.) 128; 30 L. J. (M.C.) 209; S. C. in Ex. Ch. nom., *Willes* v. *Wallington*, 13 C. B. (N.S.) 865; 32 L. J. (C.P.) 86.

dedication and user alone; and nothing in the second Act to take away that character from a street already a highway; and therefore the respondents have failed to shew that this was not a highway repairable by the inhabitants at large; and, consequently, the order on the appellant was wrong.

1870

HIRST v. HALIFAX LOCAL BOARD.

Judgment for the appellant.

Attorneys for appellant: *Sewell & Edwards, for Hill & Smith, Halifax.*

Attorneys for respondents: *Williamson, Hill, & Co.*

THE METROPOLITAN BOARD OF WORKS, APPELLANTS; THE OVERSEERS OF WEST HAM, RESPONDENTS.

Nov. 19.

Poor-rate—Beneficial Occupation—Sewers on Embankment, Rateability of.

The Metropolitan Board of Works constructed sewers on an embankment in the respondents' parish, and erected a pumping-station and other works, forming part of the main-drainage scheme. The board derived no pecuniary advantage from the sewers and other drainage works, and the whole were maintained out of funds raised by a rate made in pursuance of the statutes:—

Held, that the sewers were not rateable to the poor-rate, on the ground that they were not the subject of a beneficial occupation; but the rest of the property was rateable, at the value for which the same would let to a tenant from year to year, supposing they were not used for the purpose of the main-drainage scheme, but were entirely disconnected from it, and applied to any other purpose for which they might be available.

CASE stated under 12 & 13 Vict. c. 45, upon an appeal against a poor-rate for the parish of West Ham.

1. The appellants were rated on a net rateable value of 10,000*l.*, in respect of a pumping-station situate at Abbey Mills, and other works within the respondents' parish, inclusive of land taken and occupied for the purposes of the high and low level sewers.

2. The appellants, the Metropolitan Board of Works, are constituted by 18 & 19 Vict. c. 120, and the Acts amending the same, for the local management of the metropolis, in respect of the sewerage and drainage, &c. No part of the respondents' parish is situate within the metropolis, as defined by the above-mentioned Acts, or within the jurisdiction of the board.

1870

METROPOLITAN BOARD OF WORKS v. WEST HAM.

3. The board, in pursuance of their powers, commenced the construction of a system of sewers to intercept the drainage of the metropolis, connected with pumping-stations, by means of which the sewage is lifted from a lower to a higher level, and ultimately discharged by gravitation at a point many miles down the Thames, and without the limits of the metropolis.

4. The sewers situate within the district of the board, for the most part pass under the public highways of the metropolis, or under land which is not the property of the board. The pumping-stations and sewers, for which the board are rated by the parish, are erected upon land which is the freehold property of the board, who have acquired and use the same solely for the purposes and as part of the metropolitan main-drainage system.

5. The whole of the works, both on the northern and southern side of the river Thames, are designed and intended to carry out the purposes specified and set forth in the Metropolitan Management Acts, 1855, 1858, and 1862, the main objects being the improvement of the main drainage of the metropolis and the purification of the Thames, by the interception of the sewage, so as to prevent it, as far as may be practicable, from flowing into and polluting the river within the metropolis.

6. All the sewers on the north side of the river discharge themselves, by the works constructed under the above Acts, on the north side of the river, at a point without the limits of the metropolis, and all the sewers on the south side of the river discharge themselves by the works constructed on that side of the river, at a point about one mile beyond the limits of the metropolis, as defined by the first-mentioned Act.

7. The assessment appealed against is made in respect of a pumping-station, works, and cottages, occupying in the whole about nine acres of land, and certain lengths of the high-level sewer carried above the level of the adjoining lands, on an embankment, which embankment occupies in the whole about thirty-seven acres of land, and which pumping-station, works, cottages, and embankment, all form part of the metropolitan main-drainage and intercepting scheme, and are situate on the north side of the river Thames, in the parish of West Ham.

8. On the property comprised in the above assessment, the board

have erected the pumping-station, known as the Abbey Mills pumping-station, and other works for which they are rated.

[9. Contained a long description of the buildings and works.]

10. The total area of land upon which the pumping-station, and the works incident thereto, are situate is about nine acres, and of this about one and a quarter acre is occupied by the embankment containing the northern outfall sewer, and a further quarter acre by culverts, which carry the sewage from the low level to the outfall sewer. The remaining seven and a half acres have been raised about five feet above the original marsh level, and are so occupied by the several buildings that but little is available for any other purpose. The remainder of the land, viz., thirty-seven acres in respect of which the assessment is made, is occupied by the outfall sewer, which is carried in an earthen and concrete embankment above the general surface of the adjoining land at an average height of twenty-one feet. The entire area of the embankment is occupied by the culverts and so much earth as is sufficient for their protection and support. At the foot of the bank on either side is an open ditch and fence for the protection of the embankment.

11–13. The whole of the forty-six acres of land were rated as marsh pasture to the poor-rate of West Ham before the same were purchased by the board. The whole of the property comprised in the assessment is held, occupied, and used by the board in the manner and solely for the purposes herein set forth.

14. The appellants have not derived, nor do they derive, any profit or advantage from the drainage and intercepting works, except as herein stated, but the whole are maintained out of the funds raised in pursuance of and for the purposes of the Acts.

15. The respondents contend that the proper principle to adopt in rating the property is to treat it as if belonging to and constructed by a private owner and in his hands, to be let to the board as yearly tenants. On this contention the clear yearly rent of the whole of the property may be taken at 10,000*l.*

16. On the same principle, if the sewers and embankments were excluded from the letting; and the pumping-station and the works situate on the nine acres only were to be let to the board, the clear yearly rental may be taken at 5000*l.*

17. The whole of the property rated is specially designed and

1870

METROPOLITAN BOARD OF WORKS v. WEST HAM.

constructed for the purposes of the main-drainage system, of which it forms an essential integral part.

18. If all the property rated by the respondents, supposing the same were disconnected from the main-drainage system and applied to any purpose for which the same could be made available by a tenant, were let to a tenant from year to year, it may be taken as producing a clear annual rental of 500*l.*; and if the thirty-seven acres occupied by the sewers and embankment were excluded from such letting, the rental may, in like manner, be taken at 250*l.*

19. The respondents contend, first, that the appellants are liable to be rated in respect of the whole of their aforesaid property; and, secondly, that they are assessable on the principle contended for by the respondents, as above stated.

20. The appellants contend that the sewers and embankments ought not to be included in the rating; and that so much of their property as is liable to be rated to the relief of the poor should be rated at the value for which the same would let to a hypothetical tenant from year to year, supposing they were not used for the purpose of the main-drainage scheme, but were entirely disconnected therefrom, and applied to any other use or purpose for which they could be made available by a tenant thereof.

21. The Court was to have power to draw inferences of fact, and to amend the rate.

The question for the opinion of the Court was: Whether the mode of assessment contended for by the appellants, or that contended for by the respondents is the right mode; or if neither of those modes is correct, what is the right mode of assessment.

A. S. Hill, Q.C. (*Raymond* with him), for the appellants. There are two questions. First, are the sewers rateable? Secondly, are the other works, and on what principle? The first question is decided in the negative by *Reg.* v. *Metropolitan Board of Works.* (1) In principle it can make no difference whether the sewer is above or under ground; in either case it has no occupation value. With regard to the remainder of the property the works are rateable on the principle contained in parr. 18 and 20 of the case.

Manisty, Q.C. (*Tayler* with him), for the respondents. This case

(1) Law Rep. 4 Q. B. 15.

differs from *Reg.* v. *Metropolitan Board of Works* (1). There the sewers were underground, and consequently not rateable; but in the present case the sewer is upon an embankment, which occupies thirty-seven acres of land formerly rateable, and still liable to be rated. In *Reg.* v. *Metropolitan Board of Works* (1) the Court say, "The machinery stands on land which is valuable for occupation, and which would, undoubtedly, be rateable in the hands of any other occupiers, and its rateable quality cannot be affected by the particular use to which it is applied by the board." There is no distinction between the machinery and the embankment. So far as the occupation of land is concerned, they both occupy land which might be let to a tenant. It is admitted that the appellants are rateable in respect of the rest of the works on the principle contained in parr. 18 and 20.

1870

METROPOLITAN BOARD OF WORKS v. WEST HAM.

A. S. Hill, Q.C., replied.

MELLOR, J. I am of opinion that our judgment must be for the appellants. With regard to the thirty-seven acres of land occupied by the embankment, the decision in *Reg.* v. *Metropolitan Board of Works* (1) is conclusive. There is no distinction for the purposes of our decision between a sewer under ground and one carried on an embankment. Both are incapable of beneficial occupation, and are therefore not rateable. It would be impossible to find a tenant who would take the embankment as long as it is used for the purposes of sewers. No doubt, since *Jones* v. *Mersey Docks* (2) every description of property is rateable, but it must be capable of beneficial occupation. With reference to the residue of the works, they are clearly rateable on the principle suggested in par. 20.

LUSH, J. I am of the same opinion. The only difference between this case and *Reg.* v. *Metropolitan Board of Works* (1) is, that here the sewer is above the surface, there it was under the surface, but the principle on which that case was decided applies equally to the present. The question is, whether the subject-matter of the rate is capable of a beneficial occupation. If in its present condition it can produce no profit to the Metropolitan

(1) Law Rep. 4 Q. B. 15.
(2) 11 H. L. C. 443; 35 L. J. (M.C.) 1.

1870

METROPOLITAN BOARD OF WORKS v. WEST HAM.

Board, it cannot be supposed that any person would take it as a tenant and pay rent for it. The rateable quality of land is not to be determined by what it once was, or by what it may hereafter become. If a piece of fertile land were to be covered by the ashes of a volcano, or by an inundation, it would not be rateable so long as it continued in that condition. On the other hand, in the case of a barren rock, so long as it remains a barren rock it is not rateable, but the moment it is worked as a quarry it becomes rateable. The rateable quality of land must be determined by what it was at the time the rate is made.

As to the other part of the works, the buildings are capable of being let, and some one could be found to give something for them. On what principle are they to be assessed? I think it is well expressed in par. 20. The question is, What would a tenant give for them if they were not used as they are for the purposes of the main drainage, but entirely disconnected from it and applied to such useful purposes as they might be made available for?

HANNEN, J. I think as to the thirty-seven acres we are bound by *Reg.* v. *Metropolitan Board of Works.* (1) The judgment of the Court did not proceed upon the fact that the sewer was underground, but on the fact that the land occupied by the sewer was incapable of beneficial occupation. And I think that reasoning equally applicable to the present case, where the sewer is above ground. If there was any error in the judgment in that case, I should be inclined to think it was in holding that the land occupied by the pumping apparatus was liable to be rated. On the other part of the case I agree that par. 20 contains the true principle upon which the works ought to be rated.

Judgment for the appellants.

Attorney for appellants: *W. W. Smith.*
Attorneys for respondents: *Wilson & Son.*

(1) Law Rep. 4 Q. B. 15.

END OF MICHAELMAS TERM, 1870.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXIV VICTORIA.

FRANCE *v.* GAUDET AND OTHERS. 1871

Trover—Measure of Damages—Actual Value at Time of Conversion. *Jan.* 12.

The plaintiff purchased champagne lying at the defendant's wharf at 14*s.* per dozen, and resold it at 24*s.* to the captain of a ship about to leave England. The defendants refused to deliver the wine, and the plaintiff was unable to fulfil his contract, champagne of a similar quality not being procurable in the market. The defendants had no knowledge of the sale, or of the purpose for which the plaintiff required delivery of the champagne. In an action for the conversion :—

Held, that the plaintiff was entitled, as damages, to the price at which he had sold the champagne.

DECLARATION: That defendants converted to their use 100 cases of champagne and delivery warrants for the same, whereby plaintiff was unable to carry out a contract for sale and delivery of the cases of champagne which he had made with certain persons, and lost the benefit of the contract and the profit he would have made by the same, and was injured in his trade of a wine merchant.

Plea: That by a certain order of this Court it was ordered that, upon delivery up by defendants to plaintiff of the goods in the declaration mentioned, this action should be stayed so far as the

1871

FRANCE v. GAUDET.

goods were concerned, and that afterwards defendants delivered up the goods to plaintiff; and as to the residue of the declaration, payment of 20*l.* into court.

Replication: That the money paid into court is not enough to satisfy plaintiff's claim.

The trial took place before Lush, J., at the sittings in London after Hilary Term, 1870. The facts and course of the trial are fully stated in the judgment.

A rule was obtained, pursuant to leave reserved, to enter a verdict for the defendants, on the ground that the plaintiff was not entitled to recover at the rate of 24*s.* per dozen.

Nov. 17. *Milward, Q.C.*, and *G. Shaw*, shewed cause. The plaintiff is entitled to recover the special damage as laid in the declaration. If this were an action of contract, and the defendants had no notice of the sale of the wine to Hodder, and the purpose for which the plaintiff required the delivery of the wine, the plaintiff could not recover for the special damage: *Hadley* v. *Baxendale.* (1) Such notice, however, is not necessary in an action against a wrong-doer. In a contract the parties make their own agreement, and the measure of damages in case of a breach is limited to that which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract; and in order to recover damages which do not naturally flow from a breach of contract a notice of the purpose of the subject of the contract is necessary. This rule has no application to an action against a wrong-doer, for he absolutely incurs the whole responsibility of his wrong, and must make full compensation for the injury which has resulted from his wrongful act. In *Bodley* v. *Reynolds* (2) the Court decided that where special damage is laid and proved in an action of trover, it is recoverable; and in *Davis* v. *Oswell* (3) Parke, B., ruled that special damage might be recovered in trover if laid in the declaration. In neither of those cases was notice held necessary. In *Read* v. *Fairbanks* (4) there is a dictum of Cresswell, J., to the effect that consequential damage may arise where a person whose property has been converted was

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.
(2) 8 Q. B. 779.
(3) 7 C. & P. 804.
(4) 22 L. J. (C.P.) at p. 208.

under a contract to sell that property. So, in *Wood* v. *Bell* (1), Lord Campbell, C.J., says: "Whatever the measure of damages in cases of contract, we cannot say that there may not be special damages in tort beyond the value of the chattel. *Bodley* v. *Reynolds* (2) is express, and we approve of it." In Sedgwick on Damages, 4th ed. p. 577, the author lays down the principles which should control damages in actions of trover in these words: "The jury should be directed to give the value at the time of the conversion, with interest, unless the plaintiff has been deprived of some particular use of the property of which the defendant had knowledge; in that case, if such use would have increased its value to the plaintiff, the jury should give the highest value of the chattel at any time between the conversion and the trial, with interest from such time, i.e., the time of highest value, by way of damages for the detention." The same proposition is also stated at p. 559. Those passages will be relied upon by the defendants as being in their favour, but no authority is given for the proposition there laid down.

Sir G. Honyman, Q.C., and *Murphy*, in support of the rule. Whether the action be contract or tort, the defendant is only liable for the natural consequences of his act. The action here is based upon a demand and refusal to deliver the wine. If the wine is of a particular value in the hands of the plaintiff beyond its market value, the plaintiff ought to have given the defendants notice of it; not having done so, he is only entitled to recover the price of the wine plus a reasonable profit upon it. The damages recoverable by a plaintiff in actions, whether of contract or tort, are such as can be foreseen and expected. In *British Columbia Saw Mill Co.* v. *Nettleship* (3) ~~Willes~~, J., says, "No stronger instance can be put than that of a failure of an engagement to pay acceptances at maturity. The non-payment may cause the destruction of the creditor's trade; and the debtor may know that inevitable ruin will be the result. And yet what in that case is the measure of damages which the creditor is entitled to recover? . . The true measure is a reasonable compensation for the non-performance of the contract." So here the plaintiff is only

(1) 5 E. & B. at p. 789. (2) 8 Q. B. 779.
(3) Law Rep. 3 C. P. at p. 506.

1871

FRANCE v. GAUDET.

entitled to recover a reasonable compensation for the non-delivery of the wine. In *Bodley* v. *Reynolds* (1), and *Davis* v. *Oswell* (2), the damages recovered were the natural consequences of the wrongful act; but how could it be expected or foreseen that champagne bought at 14*s.* could be resold at 24*s.*? If the plaintiff wanted the wine for a special purpose, but the defendants supposed he wanted it for another and more obvious purpose, viz., to sell again at a reasonable profit, the plaintiff cannot recover damages for the loss he has sustained without giving the defendants notice of the special purpose for which he wanted the wine: *Cory* v. *Thames Ironworks Co.* (3). It has been doubted whether a person guilty of negligence is responsible for all possible consequences of it: *Rigby* v. *Hewett* (4); *Greenland* v. *Chaplin* (5); *Hoey* v. *Felton* (6). The passages cited from Sedgwick on Damages, 4th ed. pp. 559, 577, are expressly in point, and contain the true principle on which the plaintiff can recover damages in this action.

Cur. adv. vult.

Jan. 12. The judgment of the Court (Mellor, Lush, and Hannen, JJ.) was delivered by

MELLOR, J. In this case the plaintiff, who is a wine merchant, had for a customer a Captain Hodder, whose ship was, on the 13th of August last, in the London Docks, and about to sail. A few days before, the plaintiff had obtained samples from a person named Restall, a wine broker, who had 100 cases of champagne for sale, then lying at the defendants' wharf, for which the price was 14*s.* per dozen. The plaintiff had handed the samples to Hodder, who, on the 13th of August, agreed to purchase the 100 cases from the plaintiff at 24*s.* per dozen, to be delivered next day, whereupon the plaintiff concluded the bargain with Restall, and obtained from him the freight note and the warrants for delivery of the wine, in order that he might obtain the same, so as to enable him to perform his contract with Captain Hodder, who was then about to sail, and

(1) 8 Q. B. 779.
(2) 7 C. & P. 804.
(3) Law Rep. 3 Q. B. 181.
(4) 5 Ex. 240; 19 L. J. (Ex.) 291.
(5) 5 Ex. 243; 19 L. J. (Ex.) 293.
(6) 11 C. B. (N.S.) 142; 31 L. J. (C.P.) 105.

did actually sail on the 17th of August. On the 14th of August, the plaintiff sent to the defendants' wharf and required the delivery of the wine, but the defendants refused to deliver the wine, on the ground that a stop had been previously put upon the delivery. The plaintiff, being unable to obtain delivery of the wine, Captain Hodder sailed without it. It was admitted that champagne of that brand and quality was not to be obtained in the market, so as to enable the plaintiff to substitute 100 other cases of champagne for the 100 cases which he had purchased and contracted to sell to Captain Hodder. The wine had been delivered to the plaintiff after action brought, under a judge's order.

Upon this state of facts, the counsel for the defendants, at the trial before my Brother Lush, contended that as the defendants had no notice of the contract between the plaintiff and Hodder, they were not liable in trover for more than the ordinary value of such wine at the time of the conversion; and that, inasmuch as the defendants had paid into court a sum which covered 4*s.* per dozen for reasonable profit, they were entitled to have the verdict entered for them.

My Brother Lush reserved the question for the consideration of the Court, directing a verdict for the plaintiff for 30*l.*, being the difference between the sum paid into court and the profit at which the champagne had been contracted to be sold by the plaintiff to Hodder; with leave to move to enter a verdict for the defendants. He was not requested to leave any question to the jury; and it must be taken that if the plaintiff can recover any sum beyond that paid into court, the amount is to stand at 30*l.*; and it is also to be assumed that, if to entitle the plaintiff to recover that amount, notice of the contract between himself and Hodder ought to have been given to the defendants, then the sum paid into court was sufficient to satisfy the damages occasioned by the defendants' conversion of the wine.

Under ordinary circumstances the direction to the jury would simply be to ascertain the value of the goods at the time of the conversion, and in case the plaintiff could, by going into the market, have purchased other goods of the like quality and description, the price at which that would have been done would be the true measure of damages.

1871

FRANCE v. GAUDET.

It was, however, admitted on the trial, that in the present case that course could not have been pursued, inasmuch as champagne of the like quality and description could not have been purchased in the market, so as to enable the plaintiff to fulfil his contract with Captain Hodder.

We are of opinion that the true rule is to ascertain the actual value of the goods at the time of the conversion, and that a bonâ fide sale having been made to a solvent customer at 24*s.* per dozen, which would have been realised had the plaintiff been able to obtain delivery from the defendants, the champagne had, owing to these circumstances, acquired an actual value of 24*s.* per dozen; and we think that, in the present case, that ought to be the measure applied, and that a jury would not only have been justified in assuming that to be the value, but ought, where the transaction was bonâ fide, to have taken that as the measure of damages, and under the reservation at the trial, we think that we ought to say that such is the proper measure of damages.

It was, however, objected at the trial, in analogy to the cases of special damage arising out of the breach of contract, that notice of the special circumstances ought to have been given to the defendants, in order to entitle the plaintiff to recover anything beyond the ordinary value of the goods converted; and Sedgwick on Damages was referred to and various passages were cited, the substance of which is to be found at page 559, 4th edition. The learned author says: "It appears to me that, in principle, unless the plaintiff has been deprived of some particular use of his property, of which the other party was apprised, and which he may be thus said to have directly prevented, the rights of the parties are fixed at the time of the illegal act, be it refusal to deliver, or actual conversion, and that the damages should be estimated as at that time."

We are not prepared to say that there is any analogy between the case of contract alluded to, in which two parties making a contract for the sale and delivery of a specific chattel, the vendee gives notice to the vendor of the precise object of the purchase, and a case like the present. In the case of contract special damages, reasonably resulting from the breach of it, may be considered within the contemplation of the parties. In case of trover, it is not

in general special damage which can be recovered, but a special value attached by special circumstances to the article converted; the conversion consists in withholding from another property to the possession of which he is *immediately* entitled, and the circumstances which affix the value are then determined; no notice to the wrong-doer could then *affect the value,* although it might affect his conduct; but upon what principle is a notice necessary to a man who ex hypothesi is a wrong-doer? In such a case as the present, the actual value is fixed by circumstances at the time of the demand, and no notice of the special circumstances could then affect the actual value of the goods withheld from their rightful owner, who thereby sustains "an actual present loss," which appears to us to be a convertible term with "actual value."

It is not necessary to determine whether notice is or is not necessary in trover, in order to enable a plaintiff to recover special damage which cannot form part of the actual present value of the things converted, as in case of the withholding of the tools of a man's trade, in which the damage arising from the deprivation of his property is not, and apparently cannot be fixed at the time of the conversion of the tools. In that case, however, we are inclined to think that either express notice must be given, or arise out of the circumstances of the case. This point was not determined in *Bodley* v. *Reynolds* (1); but we think that there must have been evidence of knowledge on the part of the defendant that in the nature of things inconvenience beyond the loss of the tools must have been occasioned to the plaintiff.

The rule will be discharged.

Rule discharged.

Attorney for plaintiff: *F. Bradley.*

Attorneys for defendants: *Abrahams & Roffey.*

(1) 8 Q. B. 779, approved in *Wood* v. *Bell*, 5 E. & B. 772; 25 L. J. (Q.B.) 148.

1871
Jan. 25.

COLAM, Appellant; HALL, Respondent.

Animals, Prevention of Cruelty to—Keeper of "Place for Slaughtering Horses"—12 & 13 Vict. c. 92, s. 9.

Section 9 of 12 & 13 Vict. c. 92,—which imposes a penalty on any person who, having the management of any place for the purpose of slaughtering horses or other cattle, not intended for butcher's meat, shall use or permit to be used any horse or other cattle brought to such place for the purpose of being slaughtered,—applies to private as well as to licensed slaughter-houses.

H. had the management of the kennels of a hunt, where there was a place used solely for the purpose of slaughtering horses sent as food for the hounds. H. received a horse for that purpose and permitted him to be worked.

Held, that H. was guilty of an offence under the above section.

Case stated by Justices of Hertfordshire under 20 & 21 Vict. c. 43.

The appellant charged the respondent under 12 & 13 Vict. c. 92, s. 9. (1)

The respondent was the huntsman of the old Berkeley Hunt, and had the management of the kennels at Chorley Wood, and of the horses and hounds, the property of the hunt. To these kennels worn-out horses and other animals were occasionally sent as food for the hounds. There is a place at the kennels which was used solely as a slaughter-house for the purpose of slaughtering horses and other cattle so sent. The respondent acted in the management of it, and used it for the above purpose. On the 19th of March, 1870, a horse was sent to the respondent for the purpose of being slaughtered as food for the hounds at the kennels, and the respondent received the horse for the purpose of slaughtering it, and the horse was in and upon such place for the purpose of being

(1) 12 & 13 Vict. c. 92, s. 9: "That if any person keeping, or using, or having the management of any place for the purpose of slaughtering horses or other cattle (not intended for butcher's meat), shall use or employ, or cause, or permit to be used or employed any horse or other cattle, brought to, or delivered at, or which shall be in or upon such place for the purpose of being slaughtered, or shall permit or suffer any such horse or other cattle to leave the said place, to be employed in any manner of work; every such person shall be liable to forfeit and pay a penalty not exceeding forty shillings for every day on which such horse or other cattle shall be so used or employed, or shall be absent from such place;" . .

1871

COLAM v. HALL.

so slaughtered. The respondent permitted the horse to leave the place to be employed in work, and lent the horse to one Weedon for the purpose of being worked, and the horse was worked on divers occasions by permission of the respondent.

It was contended on the part of the respondent that the facts did not constitute an offence within the meaning of s. 9 of 12 & 13 Vict. c. 92, inasmuch as the respondent was not a keeper of a licensed place kept for the purpose of slaughtering horses and other cattle (not intended for butcher's meat); although he was the manager of an unlicensed place at the kennels, kept for such purpose; and that no keeper of a place kept for the slaughter of horses can be convicted under 12 & 13 Vict. c. 92, s. 9, unless such place has previously been licensed according to the provisions of 26 Geo. 3, c. 71, nor unless he carries on the slaughtering of cattle as a trade or business.

The justices dismissed the summons.

The question for the opinion of the Court was, Was the respondent a person keeping, or using, or having the management of a place kept for the slaughter of animals (not intended for butcher's meat) within the meaning of s. 9 of 12 & 13 Vict. c. 92?

Parry, Serjt. (*Harris* with him), for the appellant. The question is whether the respondent, being the keeper of an unlicensed place for slaughtering horses, is guilty, under s. 9 of 12 & 13 Vict. c. 92, of an offence in working a horse sent to him to be slaughtered. The words in that section are general, and its provisions apply to the keeper of a private slaughter-house as well as to the keeper of a licensed slaughter-house. The 26 Geo. 3, c. 71, requires all persons keeping slaughter-houses to take out a licence, and s. 14 exempts from its provisions persons killing horses for the purpose of feeding hounds. No such exemption is to be found in the present Act, which is an Act for the prevention of cruelty to animals, and all the sections are framed with this object. When the Act is intended to apply to licensed slaughter-houses they are expressly mentioned, as in ss. 7 and 11.

Willis, for the respondent. The 12 & 13 Vict. c. 92 was not passed solely for preventing cruelty to animals, but also for the purpose of extending the provisions of 26 Geo. 3, c. 71, and ss. 8, 9, and

1871

COLAM v. HALL.

10 were passed with that object; s. 8 provides that horses and cattle sent for the purpose of being slaughtered shall have the hair cut off the neck; s. 9 provides that the horse shall not be worked; and s. 10 requires the description of the horse to be entered in a book. These sections are supplementary to 26 Geo. 3, c. 71, and have no reference to acts of cruelty. They apply, therefore, only to those slaughter-houses mentioned in 26 Geo. 3, c. 71, which are licensed slaughter-houses.

Parry, Serjt., was not heard in reply.

MELLOR, J. I cannot agree with the argument for the respondent, that s. 9 of the present Act was only passed in furtherance of 26 Geo. 3, c. 71. The object with which the old Act was passed was to prevent persons getting rid of cattle which had been stolen or otherwise unlawfully obtained; and with this object in view very stringent clauses were inserted, amongst others, making it felony for any person to keep a slaughter-house for any purpose other than for slaughtering animals for butcher's meat without a licence. Section 7 of 12 & 13 Vict. c. 92 no doubt supplies an omission in 26 Geo. 3, c. 71, and imposes a penalty on persons neglecting to affix their name over the door of the slaughter-house. But the object of the present Act is different, it is for the prevention of cruelty to animals; and whereas, by s. 14 of the first Act, masters of hounds were exempted from its operation, the framers of this Act, thinking it just as cruel in a master of hounds as in the keeper of a licensed slaughter-house to work an animal sent to him to be slaughtered, have, by a general provision, provided that no horse or other cattle sent either to a licensed or private slaughter-house shall be worked. The words of s. 9 are "if any person"—words sufficiently large to include both classes; and we must read this section with a view to carry out the object of the Act. Section 10, no doubt, is in furtherance of the objects aimed at in s. 4 of 26 Geo. 3, c. 71; it is to facilitate the identity of animals, but I do not see why it should not apply to private slaughter-houses. The justices were wrong in dismissing the summons.

LUSH, J. If the words of s. 9 were ambiguous we should have to construe them in that sense which would carry out the object of

1871

COLAM v. HALL.

the Act, that object being the more effectual prevention of cruelty to animals. But there is no ambiguity in s. 9; the language is plain, and the framers of the Act knew that certain persons who slaughtered animals for themselves permitted them to be used; s. 9 therefore enacts that if any person having the management of a place for slaughtering horses shall use, or permit to be used, any horse, he shall be liable to a penalty. This section and the two following sections are a series of provisions passed for the purpose of insuring the humane treatment of animals. Any other construction, instead of advancing the object of the Act, would limit it. We must interpret the words in their plain and natural sense.

Case remitted to the justices.

Attorney for appellant: *Haynes.*
Attorney for respondent: *Fellows.*

BULL *v.* O'SULLIVAN.

Jan. 30.

Banker's Cheque—Cheque payable to order "on demand"—Cheque payable to order and post-dated admissible in Evidence with 1*d. Stamp*—31 *Geo.* 3, *c.* 25, *s.* 19—55 *Geo.* 3, *c.* 184, *ss.* 8, 11, 12, 13—16 *&* 17 *Vict. c.* 59—17 *&* 18 *Vict. c.* 83.

There is nothing in any of the statutes to invalidate a post-dated cheque on a banker payable *to order* on demand; and in determining what is the requisite stamp to make such an instrument admissible in evidence the instrument alone is to be looked at. Therefore, a post-dated banker's cheque payable to order is available in the hands of a person who took it with knowledge that it was post-dated; and is admissible in evidence with only a penny stamp.

DECLARATION on a cheque drawn by the defendant on the Imperial Bank payable to Edward Myers, or order, for 50*l.*, indorsed by Myers to the plaintiff, which was presented and dishonoured, of which the defendant had notice.

Plea: That the defendant did not make the cheque. Issue joined.

At the trial at the sittings in Middlesex in Trinity Term, 1869, before Hannen, J., the verdict was directed for the plaintiff, with leave to the defendant to move to enter a nonsuit.

The facts and ground of leave are given in the judgment.

1871

BULL v. O'SULLIVAN.

A rule having been obtained pursuant to the leave reserved,

May 28, 1870. *Joyce* shewed cause.

Benjamin in support of the rule.

The arguments are given in the judgment. In addition to those noticed in the judgment, the following authorities were cited: Byles on Bills, 10th ed. pp. 111, 136; *Austin* v. *Bunyard* (1); *Broughton* v. *Manchester Waterworks Co.* (2); *Nixon* v. *Albion Insurance Co.* (3); *Johnson* v. *Hudson* (4); *Green* v. *Davies.* (5).

Cur. adv. vult.

Jan. 30. The judgment of the Court (Cockburn, C.J., Mellor and Hannen, JJ.) was delivered by

HANNEN, J. This was an action by the indorsee against the drawer of a cheque for 50*l.*, bearing date the 5th of November, 1868.

The plaintiff at the trial produced the cheque, which was drawn by defendant in favour of one Myers or order, and was by Myers indorsed to plaintiff. The plaintiff stated that he received the cheque on the 4th of November, and then saw that it was post-dated. The cheque bore a penny stamp only.

On this it was objected that the cheque was not admissible or available in evidence, as it was in effect a bill of exchange or draft, payable to order at a time otherwise than on demand, and therefore required a stamp of 6*d.* under 17 & 18 Vict. c. 83, sch. [Tit. Bill of Exchange.] The judge admitted the cheque in evidence, and directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a nonsuit if the Court should be of opinion that the cheque ought not to have been admitted in evidence.

By 31 Geo. 3, c. 25, s. 19, it is enacted that no bill of exchange or promissory note, draft or order, liable to duties by that Act imposed shall be given in evidence in any court, or be admitted in any court to be good, useful, or valuable in law or equity, unless the paper on which the same shall be written shall be stamped with a lawful stamp to describe the rate or duty as by that Act required. This provision is, by 55 Geo. 3, c. 184, made applicable to the stamps required by that Act (6); and a similar enactment

(1) 6 B. & S. 687, 695; 34 L. J.(Q.B.) 217, 220.
(2) 3 B. & Ald. 1, 10.
(3) Law Rep. 2 Ex. 338.
(4) 11 East, 180, 182.
(5) 4 B. & C. 235.
(6) See 55 Geo. 3. c. 184, s. 8.

19th 11th M. T. 874

is contained in 17 & 18 Vict. c. 83, s. 2, with respect to the duty by that Act granted. By 55 Geo. 3, c. 184, sch. [Tit. Bill of Exchange], an ad valorem duty is imposed on an "inland bill of exchange, draft, or order to the bearer, *or to order*, either on demand *or otherwise*, not exceeding two months after date or sixty days after sight;" but it exempts from such duty "all drafts or orders for the payment of money to the *bearer* on demand," and drawn on a banker (within a certain distance), provided (amongst other things) "the same shall bear date *on or before* the day on which the same shall be issued."

The cheque, in the present case, not being payable *to bearer* on demand, is not within this exemption. This cheque would therefore have been subject to duty under 55 Geo. 3, c. 184, at the same rate as a bill of exchange.

By s. 11 of that Act a penalty of 50*l.* is imposed on any one who shall make, sign, or issue, or accept or pay any bill of exchange, draft, or order liable to duty without the same being duly stamped. The 12th section imposes a penalty of 100*l.* on any one who shall make and issue any bill of exchange, draft, or order for the payment of money at any time after date or sight, which shall bear date subsequent to the day on which it shall be issued, so that it shall not, in fact, become payable in two months. The 13th section imposes a penalty of 100*l.* on any person who shall make or issue any draft or order for the payment of money *to the bearer* on demand upon any banker, which shall be dated on any day subsequent to the day on which it shall be issued.

The effect of this statute was, that a draft or cheque payable to order was not invalid because it was post-dated: *Emanuel* v. *Robarts.* (1) But it required a bill of exchange stamp, and if it did not bear such stamp the person issuing it incurred a penalty under s. 11, and a disability to give it in evidence arose under 31 Geo. 3, c. 25, s. 19.

This state of things continued till the passing of 16 & 17 Vict. c. 59; but by the 1st section of that statute and the schedule, the reduced duty of one penny is imposed on a draft or order for the payment of money to the bearer *or to order on demand.* The exemption in favour of drafts on bankers payable *to bearer on demand*

(1) 9 B. & S. 121.

1871

BULL v. O'SULLIVAN.

was continued by this statute, but was finally put an end to by 21 Vict. c. 20.

The question then arises, whether the cheque in the present case is a draft for the payment of money to the bearer or order *on demand*. If it is, then it is sufficiently stamped under 16 & 17 Vict. c. 59; if, on the other hand, it is a draft for the payment of money to the bearer or to order at any time *otherwise than on demand*, then by 17 & 18 Vict. c. 83 it is not sufficiently stamped.

On behalf of the defendant, it was contended that the words "on demand" in the statutes 16 & 17 Vict. c. 59, and 17 & 18 Vict. c. 83, must be construed as meaning on *immediate* demand, and not on demand after any interval of time; that a draft on a banker is in effect a bill of exchange, and that if it be post-dated it is equivalent to a bill of exchange at so many days date as intervene between the day of the delivery and the date marked on the cheque; and that thus it is a draft for the payment of money at a time otherwise than on demand.

In support of this contention the case of *Forster* v. *Mackreth* (1) was cited. That case, however, is not an authority on the question now before us, because it did not, like the present, turn on the construction to be put on the Stamp Acts, but on the right of one partner to bind his co-partner by a post-dated cheque.

We are of opinion that the Stamp Acts above referred to, so far as they relate to bills of exchange and orders for the payment of money, deal with those documents only as they appear on their face without reference to any collateral agreement or condition by which their apparent operation may be effected. The legislature has indeed, in certain cases, made provision against post-dating such instruments, whereby their apparent effect is altered to the prejudice of the revenue, as in ss. 12 and 13 of 55 Geo. 3, c. 184; but in the absence of express enactment, there is nothing which makes it illegal to post-date a cheque or other order for the payment of money, whatever may be the effect of the post-dating on the instrument itself.

There are several authorities which support the above construction of the Stamp Acts. Thus it was held that where by post-dating a bill the proper duty is evaded, this, though it subjects to

(1) Law Rep. 2 Ex. 163.

a penalty, does not make a higher stamp necessary, on the ground that the word *date* in the Stamp Acts means the date on the face of the bill: *Upstone* v. *Marchant* (1); *Williams* v. *Jarrett.* (2)

In *Whistler* v. *Forster* (3) the question raised in the present case was brought under the consideration of the Court of Common Pleas, and all the judges present held that, in determining what is the requisite stamp on a draft payable to order "on demand" so as to make it admissible in evidence, the instrument alone is to be looked to, in accordance with the decisions above referred to, in which it had been held that the Stamp Acts, when mentioning the *date* of a bill, mean the date expressed on the face of the bill: see Tilsley's Stamp Laws, 145, 169, 170.

It was urged on behalf of the defendant that we were not bound by the decision in that case, because the title of the plaintiff to sue on the cheque was negatived there on another ground.

The point was, however, fully considered by the Court, and the opinions of the several judges upon it were expressed in so formal a manner that we should have felt ourselves bound by their decision, even if we did not, as we in fact do, entirely concur in it.

It is to be observed, also, that the same view of the operation of the Stamp Acts was acted upon by Bramwell, B., at Nisi Prius in *Key* v. *Matthias* (4); and the judges of this court who took part in the case of *Emanuel* v. *Robarts* (5) were also of opinion that there is nothing in the Stamp Acts which invalidates a post-dated cheque payable *to order.*

Our judgment, therefore, is for the plaintiff.

Rule discharged.

Attorneys for plaintiff: *Evans & Laing.*
Attorney for defendant: *J. G. Watson.*

(1) 2 B. & C. 10.
(2) 5 B. & Ad. 32.
(3) 14 C. B. (N.S.) 248; 32 L. J. (C.P.) 161.
(4) 3 F. & F. 279.
(5) 9 B. & S. 121.

1871
Jan. 27.

FOREMAN AND WIFE *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF CANTERBURY.

Local Board of Health—Surveyor of Highways—Liability of, for Negligent Misfeasance of Servants employed to repair the Roads—Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *ss.* 37, 117.

A heap of stones was left by the side of a road without light, and the plaintiff on a dark night drove his cart against it, and was upset and injured. The road was in the district of which the defendants were the local board of health, and the heap was left there by the negligence of persons employed by them to repair the roads:—

Held, that the defendants were liable as the local board, to an action for the negligence of their servants; and were not exempt from liability by reason of s. 117 of 11 & 12 Vict. c. 63, which imposes on them the same duties and liabilities as a surveyor of highways.

Quære, whether, if the negligence had been the negligence of the surveyor appointed under s. 37, the local board would have been liable for his negligence, inasmuch as the surveyor cannot be removed by them at pleasure, but only on approval by the General Board of Health.

DECLARATION: That defendants wrongfully suffered earth, rubbish, and stones, which had been placed by them in a heap on a public highway, to remain during the night without any guard or light, or means to prevent persons from driving against the same, whereby plaintiff drove his cart against the heap, and the female plaintiff was thrown out and injured.

Plea: Not guilty. Issue joined.

At the trial before Bovill, C.J., at the Kent Summer Assizes, 1870, a verdict was found for the plaintiffs. The facts and course of the trial, and the grounds of the rule for a new trial, are stated in the judgment of the Court.

Jan. 26. *Hawkins, Q.C.*, and *Archibald*, shewed cause. It must be taken, upon the admission made at the trial, that the negligence was committed by persons employed by the defendants to repair the roads. The local board of health, by s. 117 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), are made surveyors of the highways; and no doubt, as surveyors merely, they are not liable for mere nonfeasance, such as non-repair of the highways: *Gibson*

v. *Mayor of Preston* (1). But they are liable for any act of misfeasance, as this was, either by themselves or their servants: *Hartnall* v. *Ryde Commissioners* (2); *Southampton and Itchin Bridge* v. *Southampton Local Board* (3), *Harris* v. *Baker* (4), may be relied on by the other side, but that case cannot now be held to be law.

Denman, Q.C., in support of the rule. By s. 117 the local board of health are put in precisely the same position as the surveyor of a parish. Penalties are imposed upon the surveyor for this very offence, by s. 56 of 5 & 6 Wm. 4, c. 50: and no action can be maintained against that officer: *Young* v. *Davis* (5). This principle was recognized by Blackburn, J., in delivering the opinion of the judges to the House of Lords in *Mersey Docks* v. *Gibbs* (6), "that the surveyor of highways is not responsible to a person sustaining injury from the parish ways being out of repair, though no action can be brought against his principals, the inhabitants of the parish." Again in *Wilson* v. *Mayor of Halifax* (7), Kelly, C.B., delivering the judgment of the Court, points out that the remedy is by indictment, and doubts much whether an action for damages could be maintained for the injury resulting from the breach of duty by a local authority. *Harris* v. *Baker* (4), and *Holliday* v. *St. Leonard, Shoreditch* (8), are directly in point for the defendants. Moreover, this was not a misfeasance, but a non-feasance; the charge is the not lighting the heap.

[LUSH, J., referred to s. 37 of 11 & 12 Vict. c. 63.]

Cur. adv. vult.

Jan. 27. BLACKBURN, J. In this case, argued yesterday, Mr. Denman obtained a rule for a new trial, "on the ground of misdirection by the Chief Justice, in holding the defendants, as a local board, to be liable in an action for the acts complained of and proved: inasmuch as their liability, if any, as surveyors of the highway is of a different character, and no liability to an action for damages exists in such a case."

(1) Law Rep. 5 Q. B. 218.
(2) 4 B. & S. 361; 33 L. J. (Q.B.) 39.
(3) 8 E. & B. 801; 28 L. J. (Q.B.) 14.
(4) 4 M. & S. 27.
(5) 7 H. & N. 760; 31 L. J. (Ex.) 250; 2 H. & C. 197.
(6) Law Rep. 1 H. L. at p. 111.
(7) Law Rep. 3 Ex. at p. 119.
(8) 11 C. B. (N.S.) 192; 30 L. J. (C.P.) 361.

1871

FOREMAN v. MAYOR OF CANTERBURY.

The facts, as they appear by the judge's notes, were, that upon the roadside, within the district of which the Mayor and Corporation of Canterbury are the local board, there was a heap of stones left lying, which had been broken for the purpose of mending the road. Those stones projected about five feet into the road, twenty feet wide, and were not protected, nor lighted, nor was any one watching them; and upon a dark night the plaintiff and his wife, driving along in a cart, came upon those stones, were overthrown, and the wife sustained injury. The accident having arisen in that way, it is quite clear that the persons who put the stones there were negligent in not putting proper lights to protect passengers coming along the road from the risk of running upon them, and those persons would be liable for that act of negligence; and if they acted as servants of other persons, those who stood in the relation of masters to them would be answerable for the consequences of that negligence.

Mr. Denman, in the argument before us, endeavoured to raise a separate point, that the Chief Justice, in leaving the case to the jury, did not expressly ask them whether there was negligence in leaving those stones in the road, and not having sufficiently lighted and guarded them. It appears plain enough upon the facts that negligence in some one must have been taken for granted at the trial, and the rule, on that ground, was refused, and was only granted on the ground I have stated.

The local board of health are, by the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 117, made surveyors of highways; and Mr. Denman correctly stated the law, when he said that they would not be liable simply because they were surveyors of highways; but there is nothing in the Act that would relieve them merely because they were surveyors from liability which they would otherwise incur. In an ordinary case, where the surveyor of highways is acting for a township or parish, he would be clearly liable for any act of his own personal negligence. There is nothing to relieve him from that. If he had left the stones in the road in such a way as has been described he would be personally liable for the negligence. If he was himself the master of the servants, he would be equally responsible for their negligence. But in fact, and in practice, the surveyor never is the master of the persons who are employed on

the roads. There is no matter of law that would prevent him being so. If, by any arrangement he made with the parish, he took upon himself to do the work by his servants, he would be responsible for those servants, though he was surveyor of the highways. But that being an unusual and uncommon state of things it would require distinct proof to shew that the persons who left the stones in that position were his servants, they generally being the servants of the parish, and the parish being a body which cannot be sued. But when it is a local board who are acting as surveyors, the state of things is in general the other way. The persons who are employed as labourers to mend the highways are in general servants of the local board; although the local board of health are a body who might very well contract with a contractor, yet they are a body who generally do the work themselves, that is, by their servants, and pay those servants. Therefore, generally speaking, as a matter of fact, those who actually do the work, when it is done by a local board of health as surveyors, are servants of the local board of health. That, if it is a disputed fact, requires, of course, proof; but at the same time it would be the ordinary state of things. Now, when in the course of the trial evidence was about to be given in support of the case of the plaintiffs to shew that the persons who left the stones there were servants of the local board of health, there was an admission made dispensing with further proof; and after that the question went upon whether the local board could be made responsible for what had been done. I have already said, that it is our opinion that the local board of health incur no such liability merely because they are surveyors. But the local board of health, if they were masters of the persons who were guilty of negligence, would be responsible for their acts, and they are not relieved from that responsibility merely because they are either surveyors or a local board.

There was one case cited in the course of the argument (*Holliday* v. *St. Leonard, Shoreditch*) (1) in which the Court of Common Pleas decided that a body like the local board of health, who were made surveyors of highways, were not responsible for the negligence of those who were their servants; and, upon looking at

(1) 11 C. B. (N.S.) 192; 30 L. J. (C.P.) 361.

1871

FOREMAN v. MAYOR OF CANTERBURY.

the facts of that case, it would appear that it would have been an authority directly in point for the present defendants, if the case were still an authority at all; but, upon looking at the reasons of that decision, we consider it to be overruled by the decision of the House of Lords in the case of *Mersey Docks* v. *Gibbs*. (1) It is not overruled by name; but the principle upon which that case was decided in the House of Lords does overrule it, because it was decided that a public body like the local board of health are answerable for the negligence of their servants, just as if they were acting as the servants of a private person, and not for a corporation incorporated for a public purpose. Of course the individuals composing the body are not responsible; it is the local board of health that are responsible, and they would have to pay the damages out of the funds in their hands as a local board of health.

There was one other point which occurred to one of the members of the Court, and which was the only reason why we did not deliver judgment at once, and that is this: The 37th section of the Public Health Act, 1848, requires the local board of health to appoint a surveyor and other persons named as officers and servants; and at the end of the section it is said that they may dismiss at pleasure all the officers and servants, except the surveyor, and the surveyor is not to be dismissed without the approval of the General Board of Health. That being so, it would be a question to consider whether the surveyor, whom they are thus required to appoint, and whom they are not allowed to dismiss at pleasure, is in the relation of servant to them in such a way as that, if the matter were being done by the surveyor, and the cause of the mischief were the negligence of the surveyor, the local board of health would be responsible for his negligence. I do not wish to express any opinion as to whether they would or would not be responsible. But if it had appeared that the mischief had been done by the negligence of the surveyor, and that point had been raised, it would have been desirable to consider the question, and determine whether they would be responsible for the act of the surveyor or not. But we think no such question arises in this case. It is probable that the negligence was not that of the

(1) Law Rep. 1 H. L. 93. 12 Jur. (N.S.) 571

surveyor, but of some subordinate, who, though appointed by the surveyor, still was the servant of the local board, as much as a guard or a porter on a railway is the servant of the railway company, although they are appointed by the manager of the traffic, or the secretary, or some other superior officer. It is probable that the negligence was that of some subordinate; it was a fact exclusively within the knowledge of the defendants, and if their case was that the negligence was the negligence of the surveyor, who, in one view, would not be their servant, that would have been a matter which would have required proof at the trial; and where the admission was made in the general terms it was, it dispenses with this proof; and we think it cannot be said afterwards that there was any misdirection in the judge in not pointing out that distinction, inasmuch as, if it had been pointed out at the trial, it probably would have been shewn that the negligence was not the negligence of the surveyor, but was the negligence of some undoubted servant of the local board.

For these reasons we think the rule ought to be discharged.

MELLOR, HANNEN, and LUSH, JJ., concurred.

Rule discharged.

Attorneys for plaintiffs: *Monkton & Monkton, for Flint, Canterbury.*

Attorneys for defendants: *Tucker & Lake, for Lake, Canterbury.*

1871
Jan. 28.

THE QUEEN *v.* THE JUSTICES OF MIDDLESEX.

THE WEST LONDON EXTENSION RAILWAY COMPANY, APPELLANTS; THE ASSESSMENT COMMITTEE OF FULHAM UNION AND THE OVERSEERS OF FULHAM, RESPONDENTS.

Appeal—Reference to Arbitration under 12 & 13 *Vict. c.* 45, *s.* 13—*Power of Quarter Sessions over Costs.*

On a reference to an arbitrator of an appeal at quarter sessions, under 12 & 13 Vict. c. 45, s. 13, no mention being made of costs, the appeal having been regularly adjourned from sessions to sessions, on the award being made, the subsequent sessions have no power to award any costs either of the reference or of the appeal: their duty being simply to enter the award of the arbitrator as the judgment of the Court.

RULE, calling on the Justices of Middlesex to shew cause why a mandamus should not issue commanding them to enter continuances and hear an appeal of the West London Extension Railway Company against a poor-rate of the 1st of May, 1868, for the parish of Fulham, and make such order as to costs to be paid by the appellants to the respondents as they may think fit.

The appellants having appealed against the above rate, the hearing of the appeal was adjourned from sessions to sessions till the adjourned sessions, holden on the 8th of February, 1869, when, by the consent of the parties, the following order of quarter sessions was drawn up: "That the hearing and determining the matter of the appeal do stand further adjourned until the next general quarter sessions to be holden on the 5th of April next. And it is further ordered, by and with the consent of counsel on both sides, that the matter in dispute between the appellants and respondents herein shall be referred to John Gray, Esq., Q.C., to inquire into and arbitrate thereon, the said several parties agreeing and consenting to abide the report of such his arbitration."

The arbitrator made his award on the 28th of January, 1870, by which, after reciting the order of quarter sessions, he awarded that the appeal be dismissed, and that the appellants do pay to the respondents their costs of the appeal to be taxed by the proper officer of the court of quarter sessions in the usual manner.

The Court of Queen's Bench, by rule, May 12, struck out

the part of the award as to costs, on the ground that the arbitrator had no power to give costs (1); and the appeal having, in the meantime, been regularly adjourned from sessions to sessions, application was made to the sessions on the 14th of May to grant the respondents their costs of the appeal; but after again adjourning the appeal, on the 30th of July the sessions ordered the award as amended to been rolled as the judgment of the Court, and refused the application for costs, on the ground that their duty was ministerial only.

The present rule was then obtained.

Field, Q.C. (*Poland* with him), shewed cause. The mere statement of the facts shews that this was intended as a reference of the whole appeal under Baines's Act (12 & 13 Vict. c. 45), s. 13. Moreover, the quarter sessions had no power at common law to refer the matter of an appeal in the way this appeal was referred: *Thorp* v. *Cole.* (2)

THE COURT then called upon

Huddleston, Q.C., and *Castle*, in support of the rule. No doubt at common law the quarter sessions could not refer an appeal to be determined by an arbitrator; but by consent they might refer to a person agreed upon to report upon the case: *Rex* v. *Harding* (3); and this was what was done in the present case; and therefore, the appeal having been duly adjourned from sessions to sessions, the subsequent sessions had full jurisdiction over all the costs. But even assuming this to have been a reference under Baines's Act, the sessions, by adjourning the appeal from time to time, had retained their jurisdiction over the appeal, and consequently they had full power to award costs of the appeal as distinguished from costs of the reference and award. All that was decided in *Reg.* v. *West Riding* (4) was, that the sessions had no power over the costs of the reference and award; the sessions had awarded the costs of the appeal, and no objection had been made by the parties; nor did the Court throw out any doubt as to the power of the quarter sessions over the costs of the appeal.

(1) See Law Rep. 5 Q. B. 361.
(2) 2 C. M. & R. 367.
(3) 2 Salk. 477.
(4) 6 B. & S. 531; 34 L. J. (M.C.) 142.

1871

THE QUEEN v. JUSTICES OF MIDDLESEX.

BLACKBURN, J. I think it is quite plain that this rule must be discharged. The moment that the order of reference by the quarter sessions is understood the case is perfectly clear. Before Baines's Act the court of quarter sessions had no power to refer a case at all; but, as Mr. Huddleston truly said, the court of quarter sessions might, by agreement of the parties, direct that some particular fact or point of law should be ascertained by an individual agreed on, which individual reporting to them, they would take his report by consent of the parties as conclusive evidence on the particular point. In that case the sessions might go on and give their judgment, after receiving that piece of evidence, either of fact or law, from the arbitrator; but they had no power to refer an appeal, and, consequently, the arbitrator did not act under the control of the Court, and therefore what he did could not be brought before this Court to be reviewed by us. In fact the whole matter must be done privately by the court of quarter sessions, without any reference to the Court of Queen's Bench.

Baines's Act, to meet this want, enacts, by s. 13, that the court of quarter sessions may make an order referring an appeal to an arbitrator, by consent, however, "and the award of the arbitrator may, on motion by either party at the sessions next, or next but one, after such award shall have been finally made and published, or after the decision of the Court of Queen's Bench on any motion for setting aside the same, be entered as the judgment of the quarter sessions in the appeal, and shall be as binding and effectual, to all intents, as if given by the court." Nothing can be clearer than the meaning of that, without reference to cases. But if it is necessary to refer to cases, the case of *Reg.* v. *West Riding* (1) and the decision in this very case of *West London Extension Ry. Co.* v. *Fulham* (2), are both quite clear to shew that when there is a reference under s. 13, and it has been brought before the Court of Queen's Bench and been reviewed, after it has been confirmed or altered, in whole or in part, by direction of the Court of Queen's Bench, the quarter sessions have nothing more to do with it but to enter it as their judgment. It is a judgment of the Court, and they cannot alter or vary it in the slightest degree.

Taking that as the law, we find in this case that there being an

1) 6 B. & S. 531; 34 L. J. (M.C.) 142. (2) Law Rep. 5 Q. B. 361.

appeal before the quarter sessions they made this order. First, they adjourned the appeal to a future day. That was probably unnecessary, because probably at any future quarter sessions the court would be obliged to enter it as a judgment without any adjournment; but certainly it would do no harm to enter these adjournments, and it would make the record look more regular to have the continuances upon it. Then they proceeded further, and said: "It is further ordered, by and with the consent of counsel on both sides, that the matter in dispute between the appellants and respondents shall be referred to John Gray, Esq., Q.C., to inquire into and arbitrate thereon, the several parties agreeing and consenting to abide the report of such his arbitration." That one word "report" being used, instead of the words being "the several parties agreeing and consenting to abide such arbitration," is the sole thing which justifies, on the face of the matter, the contention which Mr. Huddleston endeavoured to force upon us, that this was not a reference to Mr. Gray as an arbitrator. It seems to me that that is not by any means sufficient. It is clear that the court of quarter sessions intended to refer it to Mr. Gray as an arbitrator, and having done so the sessions parted with the case, and no subsequent sessions can alter or amend what was then done. They have no jurisdiction, and they decided quite rightly in refusing to enter into the question.

MELLOR, J. I am of the same opinion. I am satisfied that, not only Mr. Gray, but the parties on both sides considered this an absolute reference by the quarter sessions; and it was only when it was found that Mr. Gray had no power to give costs under the order that the respondents changed their opinion, and now come to this court in order to compel the sessions to hear them and give them costs. If any authority were wanted beyond the plain words of the statute, I think the case which Mr. Castle quoted and pressed upon us is a very decided authority against his argument. I mean *Reg.* v. *West Riding* (1), because although the same question did not exactly arise, still, in giving judgment, the Lord Chief Justice says: "Here the original order gave no power to any subsequent court as to costs, and under s. 13 it can do no more than

(1) 6 B. & S. 531, 535; 34 L. J. (M.C.) 142.

1871

THE QUEEN v. JUSTICES OF MIDDLESEX.

enter or record the award or umpirage. Therefore, on the true construction of this section, the court of quarter sessions which made the original order is functus officio as to these costs, and no subsequent court has authority to deal with them." My Brother Blackburn also says very decidedly: "The 13th section gives power to the quarter sessions to order that the subject-matter of an appeal may be referred to arbitration in such manner and on such terms as they shall think proper. Then it says, that after the award is made and finally published, the court may be moved to enter it as the judgment of the court in the appeal. The true and fair construction of this is, that when the court, with consent of the parties, orders the case to be referred, those terms are then formally to be settled once for all, including the question by whom the costs are to be borne; and what any subsequent court does is merely ministerial. Here the original order is silent as to costs, which I think means that each party shall bear his own." Those two judgments seem to me excessively in point, and there is, therefore, no doubt that this rule must be discharged.

LUSH, J. I cannot doubt for a moment that it was the intention of all parties that this should be a reference under Baines's Act. Indeed, if it were not so, this Court could have had no power to do what they did the last time this case was before the Court, when an application was made under Baines's Act to set aside so much of the award as awarded costs. It was then conceded on both sides that it was a reference under Baines's Act. If it had not been, the Court would have had no jurisdiction to interpose. The Court, however, did deal with the case, and set aside so much of the award as gave costs. (1) That being so, I am clearly of opinion that the quarter sessions would have had no power to alter or add to the award in any respect. As soon as they made the order under that Act their judicial functions were at an end, and, supposing a valid award should be made thereafter, all they had to do was to enter it as a judgment of the court. The case cited by Mr. Castle, *Reg.* v. *West Riding* (2), is directly against his argument so far as regards the only point before the Court. There the court

(1) See Law Rep. 5 Q. B. 361.
(2) 6 B. & S. 531; 34 L. J. (M.C.) 142.

1871

THE QUEEN v. JUSTICES OF MIDDLESEX.

of quarter sessions, upon a rating case, had referred to this Court a question of law as to the principle of rating, the parties agreeing that as soon as this Court should give judgment, the question of fact should be referred to an arbitrator. This Court gave judgment in aid of the quarter sessions. Quoad, therefore, the matter of law, the judgment was the judgment of the court of quarter sessions. Then the arbitrator, to whom the matter of fact was referred, made his award confirming the rate, and holding that the assessment was not too high. Thereupon the court of quarter sessions confirmed the rate, and dismissed the appeal in toto with costs. Upon taxation of costs, the clerk of the peace refused so much of the costs as related to the reference and award, and the only question brought before this Court was whether he was right or wrong in so doing. This Court held that the reference being a reference under Baines's Act, although only upon a part of the matter, namely, the matter of fact, the court of quarter sessions had no power to alter that award, and give costs. That was the only point decided, and that is, therefore, an express decision against the present application. Whether the right to the other costs, viz., of the appeal itself, could have been sustained or not was not a question before the Court. No complaint was made about the costs of the appeal; although, if I had to express an opinion, as at present advised, it strikes me that the court of quarter sessions had jurisdiction over the appeal, because they did not refer the whole matter. They decided themselves, through the medium of this Court, the matter of law, and referred only the matter of fact. I should say if that matter had been before this Court the judgment would have been that the sessions were right on both points, and that quoad the matter which they decided they had power to deal with the costs. But in the present case the entire matter of the appeal, both of law and fact, was referred.

Rule discharged.

Attorney for appellants: *W. Heggerty.*
Attorney for respondents: *J. Alley Jones.*

1871

Jan. 25.

WATTS, Appellant; LUCAS, Respondent.

Salmon Fishery Acts, 1861 & 1865 (24 & 25 *Vict. c.* 109, *s.* 11) (28 & 29 *Vict. c.* 121) *s.* 39—*Fixed Nets for catching Salmon.*

The mere using of a net, fixed to the soil in tidal waters within the limits of a salmon fishery district, but which net is not peculiarly an instrument for catching salmon, and is not fixed for that purpose, is not an offence under s. 11 of 24 & 25 Vict. c. 109.

Case stated by Justices of Dorsetshire under 20 & 21 Vict. c. 43.

An information was laid by the appellant against the respondent under s. 11 of 24 & 25 Vict. c. 109 (1), for that he was the owner of certain fixed engines, to wit, two nets which were there unlawfully placed for catching salmon and fish in certain waters called the estuary of the river Frome.

At the hearing of the information it was admitted by the respondent that he fixed into the mud with poles two nets, one four feet deep and forty-six feet long, and the other two feet deep and thirty-six feet long, with meshes of about one and a half and one inch; one net being placed higher up the stream than the other and within the tidal waters of the Frome. But it was alleged by the respondent that the nets were so placed for the purpose of catching mullet and other fish, not of the genus Salmon; and no evidence of a contrary character was tendered by the appellant.

It was contended by the appellant that the mere fixing of any description of net in a fishery district was of itself illegal, and that 28 & 29 Vict. c. 121, s. 39, enacting that fixed engines shall, in this Act and the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), include any net or other implement for taking fish fixed to the soil, was passed to amend 24 & 25 Vict. c. 109, by using the word "fish" instead of "salmon;" and the case of *Lyne* v. *Leonard* (2) was quoted.

(1) 24 & 25 Vict. c. 109, s. 11: "No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters" . . . and the owner is made liable to a penalty not exceeding 10*l.* for each day of using or placing the same. 28 & 29 Vict. c. 121, s. 39: "Fixed engine" shall in this Act and the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), include any net or other implement for taking fish, fixed to the soil, or made stationary in any other way, not being a fishing weir or fishing mill-dam. . . .

(2) Law Rep. 3 Q. B. 156.

1871

WATTS v. LUCAS.

The justices gave the following decision:—This was a proceeding under s. 11 of 24 & 25 Vict. c. 109. We think the contention of the appellants, that the use of a fixed net was under no circumstances permissible, although it bonâ fide is not used for catching, and has not, in fact, caught, salmon, is not the correct construction of the Act. If the instrument used be one of those named in 28 & 29 Vict. c. 121, s. 34, as requiring a licence, such as a putt, putcher, net or other instrument or device for catching salmon, it would clearly be illegal to use it without a licence, though there may be no further proof of intention to catch salmon. But if the fixed instrument be bonâ fide not an instrument peculiarly meant for catching salmon, we think to bring its use within the operation of 24 & 25 Vict. c. 109, there must be some evidence that the fixed engine (such as the net in question) was placed for the purpose of catching salmon. In other words, we think that 24 & 25 Vict. c. 109, s. 11, taken in conjunction with 28 & 29 Vict. c. 121, s. 39 is to be read, "No net or other implement for taking fish, fixed to the soil, shall be placed or used for catching salmon in any inland or tidal waters." The evidence in each case would of course vary: the actual taking of salmon, the setting the nets in places likely for salmon, and the like; but as we do not understand it to be alleged that the nets were fixed for the purpose of catching salmon, we dismiss the case.

The question of law was: Whether the using of a net, which is of itself bonâ fide not an instrument used peculiarly for catching salmon, and which is not fixed for that purpose, but which is fixed to the soil in tidal waters within the limits of a salmon fishery district, comes within the operation of 24 & 25 Vict. c. 109, s. 11.

Pinder, for the appellant. The justices ought to have convicted the respondent. Section 11 of 24 & 25 Vict. c. 109 enacts that no fixed engine of any description shall be used for catching salmon in any tidal waters, and s. 39 of 28 & 29 Vict. c. 121 enacts that "fixed engine" shall include any net for taking fish fixed to the soil. It is immaterial for what purpose it is used, if it is capable of catching salmon. *Lyne* v. *Leonard* (1) is in point. That case

(1) Law Rep. 3 Q. B. 156.

1871

WATTS v. LUCAS.

was decided on s. 36, yet the words of that section are, "for catching salmon."

[LUSH, J. The offence, under s. 11, is the use which is made of the instrument; the justices in this case have found that this net is not usually used for catching salmon.]

The respondent did not appear.

MELLOR, J. I think, to constitute an offence under s. 11 of 24 & 25 Vict. c. 109, the fixed engine must be used for catching salmon. It having been decided in *Thomas* v. *Jones* (1), that a net moored at one end to a great weight, but so that part of the apparatus gives way when a fish comes to it, is not a fixed engine within the meaning of s. 11, in order to define with more certainty what the legislature meant by fixed engine, s. 39 of 28 & 29 Vict. c. 121 was passed; but it was never meant by that section to alter the character and nature of the offence constituted by s. 11. We cannot exclude from our consideration, in construing s. 11, the words "placed for catching salmon." This case is distinguishable from *Lyne* v. *Leonard* (2). There the putt was an instrument adapted for catching salmon, and could not be used without a licence, under ss. 33 and 36. In the result the justices were right.

LUSH, J. I adhere to my decision in *Lyne* v. *Leonard* (2), but this case is distinguishable. That decision turned on the construction of s. 36 of 28 & 29 Vict. c. 121. The respondent had laid down, in a salmon fishery, seventy putts, but alleged that he placed them there with the intention of catching shrimps and flat fish only. He had put some contrivance in the putts to prevent the salmon entering, which could easily be removed at any time. The justices refused to convict, on the ground that there was no evidence that the putts were there for the purpose of taking salmon, or that salmon had been caught in them. The Court decided that such evidence was not necessary, because, reading s. 36 with s. 33, the words that are used clearly apply to using instruments adapted for catching salmon, whether they are really used for that purpose or not. I take the justices, in the present case, to have found that

(1) 5 B. & S. 916; 34 L. J. (M.C.) 45. (2) Law Rep. 3 Q. B. 156.

the net was not a net within s. 36. The net, then, not being an instrument used peculiarly for catching salmon, brings us back to s. 11 of the other Act, which enacts that "no fixed engine of any description shall be placed or used for catching salmon." Clearly the offence under this section is not in using a fixed engine, but in using it for the purpose of catching salmon. Section 39 was enacted to avoid the effect of the decision in *Thomas* v. *Jones*. (1) Taking s. 39 with s. 11, it would read as the justices have suggested, "No fixed net for taking fish shall be placed or used for catching salmon in any tidal waters." The offence is not the use of the net for any purpose, but for the purpose of catching salmon. The justices were right in coming to the conclusion that no offence was shewn to have been committed, assuming that this instrument was not a net for catching salmon within s. 36 of 28 & 29 Vict. c. 121.

Judgment for the respondent.

Attorneys for appellant: *Sole, Turner, & Turner.*

(1) 5 B. & S. 916; 34 L. J. (M.C.) 45.

1871
Feb. 22.

THE HAMMERSMITH BRIDGE COMPANY, APPELLANTS;
THE OVERSEERS OF HAMMERSMITH, RESPONDENTS.

Sewer Rate—Old Exemptions from Sewer Rate—General Benefit derived from Sewer—Rating of Bridge—Metropolitan Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 164—*Metropolitan Sewers Act*, 1848 (11 & 12 *Vict. c.* 112).

The Metropolitan Management Act, 1855 (18 & 19 Vict. c. 120), s. 164, provides that, where any property was, at the time (1848) of issuing the first commission under 11 & 12 Vict. c. 112, entitled to exemption from sewer rate, such exemption shall be allowed in levying any sewer rate under this Act; and s. 76 of 11 & 12 Vict. c. 112, also preserves the old exemptions.

The H. suspension-bridge over the Thames, in a metropolitan district, was built with approaches or roads under an Act of Parliament, and is open to the public on the payment of tolls. The bridge itself drains directly into the river, but the approaches or roads now drain into a sewer made in 1854, but they were sufficiently drained before through a barrel drain (which could still be used), into the river. A sewer rate having been assessed upon the bridge and the approaches, the bridge company appealed, on the ground that the bridge, as distinct from the approaches, was entitled to exemption as deriving no benefit from the sewer:—

Held, by Blackburn and Hannen, JJ., that, though the bridge did not derive any direct or immediate benefit from the sewer, a property such as the bridge and roads did derive "the general benefit and advantage of being accessible and of its approaches and neighbouring public ways being properly drained and cleansed," within the principle of *Soady* v. *Wilson* (3 Ad. & E. 248); and that, consequently, on the authority of that case, the property would not have been exempt from sewer rate before 1848; and that therefore the bridge as well as the roads was liable to the sewer rate.

Cockburn, C.J., dissented, on the ground that no such general benefit could be derived by the bridge from the sewerage of the district.

Metropolitan Board of Works v. *Vauxhall Bridge Company* (7 E. & B. 964; 26 L. J. (Q.B.) 253), discussed. 3 Jur. N.S. 1216.

CASE stated under 12 & 13 Vict. c. 45, on an appeal against a sewer rate made on the 16th of March, 1868, for the parish of Hammersmith.

1. The appellants were rated in respect of the "moiety of suspension bridge, appurtenances and approaches," in one sum, at a gross estimated rental of 1106*l.*, and in a rateable value of 956*l.*

2. The appellants are "The Hammersmith Bridge Company," incorporated by 5 Geo. 4, c. cxii., for the purpose of building a bridge over the Thames, from Hammersmith, in the county of Middlesex, to Barnes, in the county of Surrey, and for making

convenient roads and avenues to communicate with such bridge. The Act was altered and amended by 9 Geo. c. lii. (1).

4. The respondents, the overseers of the parish of Hammersmith, made the rate under an order of the Board of Works for the Fulham district, constituted by the Metropolitan Management Act, 1855, 18 & 19 Vict. c. 120 (amended by 19 & 20 Vict. c. 112, and 25 & 26 Vict. c. 102), for the local management of the metropolis, in respect of the sewage and drainage, and the paving and cleansing, lighting and improvements thereof.

5. The appellants, under the powers conferred upon them by these Acts, made and completed a bridge over the Thames, and the bridge and the approaches were thrown open to the public for use, upon payment of the prescribed tolls, in 1827. The bridge and approaches have from thence been maintained by the appellants for and have been used by the public.

6. The parish of Hammersmith is one of the two parishes that compose the Fulham district. It extends on the south to the middle line of the river Thames. "The bridge" crosses the river from Hammersmith, on the north side, to Barnes, on the south side; one half being in Hammersmith parish, and the other half being in Barnes parish.

7. The bridge drains directly into the river, and no part of it drains into the sewers of the district board of works, or into any sewer whatever. The approaches, "the roads," and other neighbouring public ways, are drained partly by the Metropolitan Board of Works, and partly by the district board of works.

8. The appellants under the powers of the above Acts also purchased land, and formed roads on each side of the bridge as approaches thereto. These roads they are bound to keep and have kept in repair. These roads did not drain into any common sewer until 1854 (none having existed there previously), up to which time the surface water was carried off by a barrel drain into the river. This barrel drain was made and maintained by the appellants, and is still in existence, and might be used as before. In the year 1854, the then commissioners of sewers constructed a

(1) The above Acts were to be taken as part of the case. The chief sections referred to of the first Act are given in 15 Q. B. 369, note (b); and no sections of the other Act were referred to.

1871

HAMMERSMITH BRIDGE COMPANY v. OVERSEERS OF HAMMERSMITH.

sewer, hereinafter called "the new sewer," under the appellants' land. This sewer goes from the high road at Hammersmith into the Thames near Hammersmith Bridge, and the commissioners made gullies to conduct the surface water from the road to the sewer. The appellants did not require this to be done, nor was it necessary for them that it should be done, inasmuch as up to the time of the construction of the new sewer the barrel drain was amply sufficient to carry off, and did carry off, the surface water from and effectually drain the roads.

9. The new sewer became vested in the Metropolitan Board of Works by virtue of the Metropolitan Local Management Act, 1855, s. 35, and sch. D., and since it was constructed always has been and still is in operation as above described.

10. The houses adjacent to "the roads" drain into the new sewer. The surface water diverted from the appellants' barrel drain into the new sewer assists to carry down the soil in that sewer.

11. The owners and occupiers of the adjacent houses pay the sewer rate in respect of them. No sewer rate was ever made upon or paid in the parish till the year 1854, but in that year, and from thence to 1861, rates were made upon and paid by the appellants.

12. In 1862, after the opinion pronounced by the Court of Queen's Bench, in the *Vauxhall Bridge Case* (1), the appellants objected to the charge of sewer rate, and the then overseers, in conformity with that opinion, reduced the appellants' rating from the rateable value of 475*l.* to 40*l.* in respect of a "moiety of suspension bridge appurtenances." This rating was continued down to the making of the rate now appealed against.

13. The rate appealed against is made on the persons including the appellants, and in respect of the property including "the bridge," by law rateable to the relief of the poor in the parish, and is assessed upon the net annual value of such property ascertained by the poor-rate for the time.

15. It was agreed that no objection was to be taken to the form of the rate.

16. The appellants contend that they are not liable in respect of "the bridge," but only in respect of "the roads," in the rate called "the approaches." The respondents contend that "the

(1) 7 E. & B. 964; 26 L. J. (Q.B.) 253.

bridge" and "the roads" are one property, and as such both rateable according to the assessment to the poor-rate.

17. The question for the opinion of the Court was:—Whether the bridge and the roads called in the rate "approaches" are to be both rated to the sewer rate, or whether the bridge is exempt, and the roads only are rateable. If the former, the rate is to stand, and judgment is to be entered for the respondents with costs. If the latter, judgment is to be entered for the appellants with costs, and the sewer rate is to be amended by confining the assessment to the approaches, and reducing the rate to 40*l.*

Jan. 18. *J. Brown, Q.C.* (with him *Raymond*), for the appellants. The bridge, as distinct from the approaches, is not rateable to the sewer rate. It is found in the case that it derives no benefit from the sewer, being drained directly into the river. The rate is imposed by an order of the board under s. 158 of 18 & 19 Vict. c. 120; by s. 161, the overseers are to levy the rate in the same way as the poor-rate; but by s. 164, where any property at the time of the issuing of any commission under 11 & 12 Vict. c. 112, was entitled to exemption from, or to any reduction in respect of sewer rate, such exemption or reduction is to be allowed. This point, as far as an express, though extra-judicial, opinion in a considered judgment of this Court, has already been decided in favour of the appellants in *Metropolitan Board of Works* v. *Vauxhall Bridge Co.* (1), where the Court held that s. 76 of 11 & 12 Vict. c. 112, which is precisely the same in form as s. 164 of the present Act, had carefully preserved the ancient principle of rating for sewers, and that in rating the benefit derived from the sewers by the property should still be regarded. In that case the Court declined to go on and give any opinion as to the quantum of benefit. Again, in the *Hackney and Lamberhurst Cases* (2), it was expressly decided that the principle was preserved by s. 164, "which regulates the imposition of sewer rate, namely, that of actual benefit received by the property rated." In *Reg.* v. *Head* (3), the Court held that the

(1) 7 E. & B. at p. 983; 26 L. J. (Q.B.) at p. 256.

(2) E. B. & E. at p. 45; 27 L. J. (M.C.) at p. 241.

(3) 32 L. J. (M.C.) 115; also reported 3 B. & S. 419; but this report was not before the Court.

1871

HAMMERSMITH BRIDGE COMPANY v. OVERSEERS OF HAMMERSMITH.

quantum of benefit could not be regarded if any benefit were shewn to be derived by the property, and though that will apply to the rating of the approaches, it leaves the bridge untouched, no benefit at all being derived by that. This principle, that some benefit must be shewn, was always observed under the old law: *Masters* v. *Scroggs* (1); *Stafford* v. *Hamston* (2); *Rex* v. *Tower Hamlets Commissioners*. (3) *Soady* v. *Wilson* (4), will be relied on by the other side, in which it was held that property is liable to be rated for the sewers although the benefit be not immediate. That case, to say the least of it, goes to an extreme length; but such property as Somerset House is very different from such a structure as a bridge, and indirect benefit may well have been derived by Somerset House on principles totally inapplicable to a bridge.

Jan. 25. *C. Pollock, Q.C.* (*Will* with him), for the respondents. By 5 Geo. 4, c. cxii., the bridge and approaches are treated throughout as one concern. By ss. 63 and 66 the company of proprietors are empowered to build a bridge "with convenient roads and approaches." By s. 121 they may set up toll-gates on any part of the bridge and approaches. And by ss. 138, 139, the bridge and roads are treated as one for the purpose of repair and lighting. Indeed, the approaches are absolutely necessary to and form a component part of the bridge. The whole property, bridge and approaches, must therefore be taken as one; and if any part of it derives benefit from the sewers (as it is clear the approaches do), the whole is rateable, and the quantum of benefit is immaterial. *Soady* v. *Wilson* (5) is directly in point, even assuming no immediate benefit be shewn to the bridge taken per se. There the Court say: "The benefit is not required to be immediate, nor do the cases, or the commission itself, or the statutes, say anything of the nature or the amount of the benefit." More benefit, by the absolute draining of the approaches, is shewn here than in that case, where the only benefit the buildings of Somerset House derived from the sewers was the general benefit and advantage of being accessible, and of its approaches and neighbouring public

(1) 3 M. & S. 447.
(2) 2 B. & B. 691.
(3) 9 B. & C. 517, 521.
(4) 3 Ad. & E. 248.
(5) 3 Ad. & E. 248, 263.

ways being properly drained and cleansed. In *Dorling* v. *Epsom Board* (1) the same principle is applied to a district rate, that the quantum of benefit is immaterial so long as some part of the general property is benefited. In *Rex* v. *Barnes* (2), and in *Reg.* v. *Hammersmith Bridge Co.* (3), this bridge was held liable to the poor-rate of the two parishes of Barnes and Hammersmith on the principle that the bridge and approaches were one concern. *Masters* v. *Scroggs* (4) was decided without full consideration. It is inconsistent with *Soady* v. *Wilson* (5), and went on the principle that the district or area over which each rate was to extend must depend upon the level. Here the area of the rate is defined by the district independently of any level. The opinion of this Court in *Metropolitan Board of Works* v. *Vauxhall Bridge Co.* (6) is really in favour of the rateability of the bridge. The Court say that regard must be had to the benefit which the property derives from the sewers as under the old law; but that, as explained by Crompton, J., in *Reg.* v. *Head* (7), who was one of the Court in the previous case, has reference, not to the quantum, but to the principle that, under the old law of sewers, some benefit must be shewn. The old law is expressly preserved by 18 & 19 Vict. c. 120, s. 164, and 11 & 12 Vict. c. 112, s. 76; and the exemption and rateability must depend on what was the old law as explained by the cases.

Raymond, in reply. It is a fallacy to say the bridge and approaches are one whole in the sense applicable to rating purposes. It is true that they are one property in the sense of belonging to one person. But for the purpose of rating to the sewer rate you must look at each part and see whether any benefit is derived by that particular part of the property, be it land or anything else. The legislature having deliberately declared that the old exceptions shall remain; to hold the bridge rateable will be to abrogate s. 164, and make a sewer rate precisely similar to a poor-rate. *Soady* v. *Wilson* (5) was decided before the recent statutes, but it

(1) 5 E. & B. 471; 24 L. J. (M.C.) 152.
(2) 1 B. & Ad. 113.
(3) 15 Q. B. 369; 18 L. J. (M.C.) 85.
(4) 3 M. & S. 447.
(5) 3 Ad. & E. 248.
(6) 7 E. & B. 964; 26 L. J. (Q.B.) 253.
(7) 32 L. J. (M.C.) 115; but see 3 B. & S. at p. 424.

1871

HAMMERSMITH BRIDGE COMPANY v. OVERSEERS OF HAMMERSMITH.

is clearly distinguishable on the ground already taken. All direct benefit is expressly negatived. What benefit is there shewn in the remotest degree to the bridge? *Dorling* v. *Epsom Board* (1) has no bearing on a sewer rate. That was the case of a district rate under 11 & 12 Vict. c. 63, none of the sections of which have any clause like s. 164, or s. 76, as to the old exemptions from sewer rates.

Cur adv. vult.

Feb. 22. The judgment of Blackburn and Hannen, JJ., was read by

HANNEN, J. In this case the appellants have been rated to a sewer rate in respect of so much of their property as is in the parish of Hammersmith. The parish of Hammersmith forms part of the Fulham district, and the rate is imposed under the Act for the Local Management of the Metropolis, 18 & 19 Vict. c. 120.

The property of the appellants consists of a suspension bridge thrown over the Thames from the north bank, which is in the parish of Hammersmith, to the south bank, which is in the parish of Barnes. The boundary between the two parishes is the medium filum aquæ of the River Thames, so that one moiety of the property of the appellants lies in the parish of Hammersmith. This moiety consists of one-half of the structure which extends from bank to bank, and hangs over the River Thames, and which, in the case, is called the "bridge," and of the whole of the land on the northern side occupied by the appellants, so as to afford facilities for getting access to the bridge, and which, in the case, are called "roads." Neither phrase is, perhaps, precisely accurate, but they are sufficient to convey the meaning of the parties.

The "bridge" (if the meaning of the word is thus restricted to the structure suspended in the air over the bed of the Thames) derives no immediate or direct benefit from the drains or sewers of the Fulham district; the roads and approaches are, it appears from the 8th paragraph of the case, now, in fact, drained by a new sewer, though this was not required by the appellants, their old drainage being sufficient for them.

By agreement in the case no objection is to be made to the form

(1) 5 E. & B. 471; 24 L. J. (M.C.) 152.

of the rate; the question for the Court being, whether the "bridge" and the "roads" are to be both rated to the sewer rate, or whether the "bridge" is exempt, and the "roads" only are rateable?

The statute 18 & 19 Vict. c. 120, s. 164, provides that where any property was at the time of the first commission under 11 & 12 Vict. c. 112, "entitled to exemption from or to any reduction or allowance in respect of the sewer rate, such exemption, reduction, or allowance shall be observed and allowed in levying any sewer rate under this Act." We are thus referred back to 11 & 12 Vict. c. 112, now expired. The 34th section required the commissioners, from time to time, to divide the metropolis into separate sewage districts, "having regard in such division or formation to the nature of the ground, to the main line of the sewers by which such separate districts are or shall be drained, or to the main line of sewers which it may appear to the commissioners expedient to form for the drainage of such sewerage districts, and to the equal benefit as far, as may be, of all lands and buildings comprised in such districts." Section 76 enables the commissioners to levy a district sewer rate in each sewerage district on the persons and in respect of the property within each district by law rateable to the relief of the poor; and then comes this proviso, "that where in any separate sewerage district any property is by law, or by the practice of the existing commissions or commissioners of sewers, entitled to exemption, wholly or partially from, or to any reduction or allowance in respect of the sewer rate, the commissioners shall, in making the district sewer rate observe and allow such exemption, reduction, or allowance." It is on those clauses that the present question depends.

It seems clear from the mode of legislation adopted, that the proviso in s. 76 of 11 & 12 Vict. c. 112, is brought down into the present Act; and the appellants' contention is, that the "bridge" is property which in 1848, when 11 & 12 Vict. c. 112 received the royal assent, was by law "entitled to exemption" from a sewer rate.

No question arises as to the practice of former commissioners, as no sewer rate was levied in this district before 1848.

Under the old law of sewers the commissioners had no jurisdiction to impose a rate on any property which did not derive

1871

HAMMERSMITH BRIDGE COMPANY v. OVERSEERS OF HAMMERSMITH.

benefit from the works for the maintenance of which the rate was levied, and as long as the only object for which such works were made was to protect from the inroads of the sea, or to relieve from land-floods and stagnant waters, the district benefited was the level, that is, that district which, to adopt the language in *Rooke's Case* (1), was "subject to drowning" if the work was not maintained. And in *Rex* v. *Commissioners of Tower Hamlets* (2) this Court determined that the commissioners were bound to divide the district, over which they had jurisdiction, into levels of this sort, and could not join Hackney, which drained into the river Lea, in the same district as the rest of the Tower Hamlets, which drained into the river Thames, and consequently required different sewers. Lord Tenterden, in delivering the judgment, says: "A great deal of reliance was placed in the argument on the word 'level,' which is found in the report of *Rooke's Case* (3), and in which it is said that all who be within the level are to contribute. That is very true, but the question is, what is the meaning of the word 'level?' Now, that word does not occur in the Act of Parliament, neither does it occur in the commission. If we are to attribute to the word 'level' the sense sought to be attributed to it in this argument, that will make it an artificial division of the land; whereas the natural import of the word denotes not an artificial division of the land, but the particular character and situation of it. So understood, all those cases and all those expressions which say that the rate is to be made equally upon all the inhabitants of the level will stand untouched by our decision." This is quite consistent with good sense, as long as the object of the sewers was only to save the land from being drowned; but as soon as sanitary objects become of importance, the level of the ground, though an important element in determining what district was benefited by the sewers, ceased to be the sole or even the chief one; and accordingly in *Dorling* v. *Epsom Board* (4) this Court, in construing the Public Health Act, 1848 (11 & 12 Vict. c. 63), held, that "the occupier of premises within a district under the management of a local board of health may be assessed to a special district rate, where the premises, in respect of which he is so assessed, derive no direct and

(1) 5 Rep. 99, b.
(2) 9 B. & C. 517, 523.
(4) 5 E. & B. 471, 483; 24 L. J. (M.C.) 152, 156.

immediate benefit from the works to meet the expense of which the rate is imposed."

The provisions of the Public Health Act, 1848, though very analogous to those of 18 & 19 Vict. c. 120, are not precisely the same; and the Public Health Act, 1848, contains nothing equivalent to the proviso in s. 76 of 11 & 12 Vict. c. 112, which is by reference brought down into 18 & 19 Vict. c. 120. It is not easy to assign any reason why the legislature should have intended to apply a different rule as to sewerage districts within the metropolitan district from that which applies to those outside of that district; but there seems no doubt that by this proviso they have to some extent done so.

In *Metropolitan Board of Works* v. *Vauxhall Bridge Co.* (1) the Vauxhall Bridge Company were assessed to a sewer rate on their property under circumstances not at all differing from those under which the now appellants are assessed in respect of theirs. The action was brought with the intention of raising the very question now before us. The decision of the Court was, that the question could not be raised by action, being only matter of appeal; but Lord Campbell intimated for the guidance of the parties an extra-judicial opinion of the Court (though, as he says, aware that it was not binding) that the commissioners in making the rate "ought not to have considered merely the value of the property of the company, as in making a poor-rate, but should have been guided by the benefit which they considered that the property derived from the sewers." He adds, "Having said so much respecting the construction of the Act of Parliament, we must refrain from giving any opinion as to whether benefit was derived from the sewers to any or what part of the property which the commissioners must be fully competent to determine."

The commissioners, acting on this advice, have from that time imposed no sewer rate on the Vauxhall Bridge, though they have rated the approaches; and a similar practice has been followed in respect of the Hammersmith Bridge until the present rate, on which the appeal is brought, in order to have a judicial determination on the question.

There are expressions in the opinion given by Lord Campbell

(1) 7 E. & B. 964, 983; 26 L. J. (Q.B.) 253, 256.

1871

HAMMERSMITH BRIDGE COMPANY v. OVERSEERS OF HAMMERSMITH.

that seem to favour an idea that the amount of the assessment was to be proportionate to the amount of the benefit derived by the particular property; but in *Reg.* v. *Head* (1) Crompton, J., who was a party to the *Vauxhall Bridge Case* (2) explains that it was intended merely to express that if there was no benefit (by which we understand to be meant no direct and immediate benefit) there was to be no rate, but if there was any benefit the amount of the rate was to depend upon the poor-law assessment.

We are not to be understood as affirming the principle laid down in the *Vauxhall Bridge Case* (2), even thus qualified, or as determining that the principle of *Dorling* v. *Epsom Board* (3) is not applicable to a district within the metropolis; but we do not think it necessary in this case to decide the general question; for in *Soady* v. *Wilson* (4), where it was found as a fact that Somerset House did not derive any immediate benefit from the sewers "*except the general benefit and advantage of being accessible, and of its approaches and neighbouring public ways being properly drained and cleansed*," this Court held the rate valid, the Court saying in their judgment that "The benefit is not required to be immediate, nor do the cases, or the commission itself, or the statutes say anything of the nature or amount of the benefit. Possibly that benefit may be so extremely small that a jury would not have found the fact stated in the case. But, on the other hand, the kind of benefit may be of high value, as if a house were inaccessible because surrounded by marshes, and the works of sewage had made them hard and passable."

It seems to us that a property such as the bridge and roads of the appellants does derive a benefit of this kind from the proper sewerage of the district, and consequently on the authority of *Soady* v. *Wilson* (5) that it would not have been exempt from the jurisdiction of the commissioners of sewers antecedent to 1848.

If this be so, the consequence follows that the judgment must be for the respondents.

(1) 32 L. J. (M.C.) 115; but see 3 B. & S. at p. 424.

(2) 7 E. & B. 964, 983; 26 L. J. (Q.B) 253, 256.

(3) 5 E. & B. 471; 24 L. J. (M.C.) 152.

(4) 3 Ad. & E. 248, 252.

(5) 3 Ad. & E. 248.

HANNEN, J., read the judgment of

1871

HAMMERSMITH BRIDGE COMPANY v. OVERSEERS OF HAMMERSMITH.

COCKBURN, C.J. I regret that I am unable to concur in the judgment of the majority of the Court.

I agree with the general reasoning of my learned Brothers and their exposition of the law; nor am I disposed to question the authority of the case of *Soady* v. *Wilson* (1); but that case appears to me to be inapplicable to the present, as I cannot see how the property of the appellants on Hammersmith Bridge can possibly derive benefit from the sewerage of the district, whether in a sanitary point of view or any other.

The bridge is only of use to the public, and of value to the appellants as a means of transit from the one side of the river Thames to the other, and in this respect it differs from the ground occupied by the approaches, which are partly built upon, and which, serving for the purpose of habitation, derive benefit from the drainage of the neighbourhood. The bridge plainly derives no immediate benefit as regards sanitary purposes, neither does it as regards the getting rid of its superfluous moisture, as the latter is carried immediately into the Thames by means wholly independent of the district drainage.

It is, however, said, that the bridge, as well as the approaches to it, may derive a benefit from the proper sewerage of the district, and that the case comes therefore within the principle of the decision in *Soady* v. *Wilson* (1). It does not appear to me that this can be so in point of fact. The roads which lead to this bridge from the metropolis and elsewhere are public roads, and must be maintained in a proper state independently of the district drainage. I cannot suppose that the general public, desiring to cross the river Thames into Surrey, will be materially influenced by the state of the sewerage or drainage of the Fulham district; and though it may be said that the traffic over the bridge may be increased by the neighbourhood on the northern side being populous and frequented, and that this state of things will be promoted by an efficient system of sewerage, the benefit to be derived to the bridge property from this source appears to me of too speculative, uncertain, and minute

(1) 3 Ad. & E. 248.

1871

HAMMERSMITH BRIDGE COMPANY v. OVERSEERS OF HAMMERSMITH.

a character to justify the subjecting it to a rate for the sewerage of the district on the assumption of such a benefit.

For these reasons, I think our judgment ought to be in favour of the appellants; but as my learned Brothers hold otherwise, the judgment of the Court must be for the respondents.

Judgment for the respondents.

Attorneys for appellants: *S. F. Miller & Son.*

Attorneys for respondents: *Watson & Sons.*

Jan. 31.

PAPE *v.* LISTER.

Inspection of Documents—14 & 15 *Vict. c.* 99, *s.* 6—*Breach of Promise of Marriage—Letters.*

A defendant is entitled to inspect documents in the plaintiff's possession bearing upon the amount of damages, though there be no issue to be tried.

Defendant in an action for breach of promise of marriage applied for leave to inspect letters written by him to plaintiff. Defendant, in his affidavit, admitted the promise to marry, and said he was advised and believed that it was necessary for him on the trial, and to prepare for the trial, to have the letters produced, and that he would derive advantage from the production. Plaintiff, by affidavit, objected to the production of the letters on the ground, amongst others, that defendant might refer to some of the letters in mitigation of damages:—

Held, that defendant was entitled to inspection.

DECLARATION for breach of promise to marry.

Pleas: 1. Non assumpsit. 2. Denial of plaintiff's readiness and willingness to marry defendant. 3. Exoneration and discharge.

Issues thereon.

A summons was taken out by defendant, before Cleasby, B., for leave to inspect the letters written by him to plaintiff, and also the letters written by plaintiff to him, which he had since returned to plaintiff.

The defendant, in his affidavit, said:—

"I do not deny that I was formerly engaged to be married to the plaintiff, and during and since such engagement I wrote to the plaintiff several letters, the respective dates of which I do not remember, in relation to the engagement, and I received several letters from her. (3.) I never made, or kept, or had, nor have I in my possession or control any copy or copies, or any extract or extracts, from the said letters, or any of them, and I have some time ago returned to the plaintiff

all or most of the letters written by her to me, but she has not returned to me the letters written by me to her. (4.) I am advised and believe that it is material and necessary for me on the trial of this cause, and to prepare for the trial thereof, to have such letters produced to me, and that I shall derive advantage from the production thereof. (5.) I am advised and believe that I am entitled to the production of the said letters for the purpose of discovery."

The plaintiff's affidavit, in reply, stated, amongst other things:—

"I object to the production of the documents, on the ground that the defendant ought not to be enabled to compel me to shew my case, and for the defendant to copy it; that I do not sue upon any particular letter; that the defendant promised to marry me, and that if I can make out my case, either by verbal testimony or letters, I ought not to be compelled to produce such letters; that if the defendant wishes to have any letters produced on the trial he should give notice for them to be produced, and call for them in the usual way; the defendant requires none to complete his pleas, as he pleads release and exoneration; that the defendant ought not to be enabled to compel the production of some letters which he might refer to in mitigation of damages; and that if the defendant wishes the production of any particular letter for the purpose of discovery, and if he is entitled to it, he should apply in the usual way."

Cleasby, B., granted inspection of plaintiff's letters to defendant; but refused inspection of defendant's letters to plaintiff.

A rule having been obtained calling upon plaintiff to shew cause why the order of Cleasby, B., should not be varied by also allowing inspection of defendant's letters to plaintiff,

A. Wills shewed cause. (1) Defendant has no right to inspect his letters to plaintiff. Inspection, apart from statutory enactment, was limited to the case where there was but one copy of an agreement, and it was held by one party as a trustee for the other: *Shadwell* v. *Shadwell* (2); *Price* v. *Harrison*, per Erle, C.J. (3); *Hamer* v. *Sowerby*. (4) Here plaintiff is not in any sense a trustee of the letters in question for defendant. Nor do they constitute an agreement. The agreement to marry is expressly admitted by defendant in his affidavit. The statute 14 & 15 Vict. c. 99, s. 6, extending the common law right of parties to an action to inspection, is limited to documents "relating to such action or legal proceeding." That means that the documents must be shewn to relate to the issues in the cause. In

(1) In the Bail Court, before Lush, J.

(2) 6 C. B. (N.S.) 679; 28 L. J. (C.P.) 315. 5 Jur. N.S. 1410

(3) 8 C. B. (N.S.) 617, at p. 633; 29 L. J. (C.P.) 335, at p. 338. 6 Jur. N.S. 1346

(4) 3 L. T. (N.S.) 734.

1871

PAPE v. LISTER.

Galsworthy v. *Norman* (1), Erle, J., limits the right of inspection to "papers that may support the case on which the defendant relies." In *Stone* v. *Strange* (2), where the defendant in an action for breach of promise of marriage was allowed to inspect his own letters, the affidavit shewed that he had a defence on the merits, and that the letters related to the case he was going to set up.

Thrupp, in support of the rule. Defendant is entitled to inspection of his letters at common law; for they form, in fact, the agreement between the parties. *Shadwell* v. *Shadwell* (3) drew the line too narrowly: *Price* v. *Harrison* (4), per Willes and Byles, JJ. But, at any rate, the defendant is entitled to inspection under 14 & 15 Vict. c. 99, s. 6. The words, "relating to such action," do not mean merely affecting the issues actually raised, but affecting the verdict of the jury, or the result of the cause. And here the plantiff's own affidavit shews that the letters are such as to affect the damages. *Stone* v. *Strange* (2) and *Chute* v. *Blennerhasset* (5), are expressly in point.

Cur. adv. vult.

LUSH, J. I have consulted my learned Brothers, and the conclusion at which we have arrived is, that this rule must be made absolute. I do not agree with Mr. Wills' contention that "relating to such action," means relating to the issues raised. I think if documents relate to the amount of damages, that is quite sufficient. Now, in the present case it is true that the defendant's own affidavit is very vague. But we must look at the nature of the action. In such a case the letters of the parties must have a bearing at least upon the damages. Then the plaintiff's unwillingness to produce the letters is itself a very important fact. Indeed, some of my Brothers are inclined to think that this alone would be sufficient reason for granting inspection of them. But, further, there is the paragraph in the plaintiff's affidavit where she says that "the defendant ought not to be enabled to compel the production

(1) 21 L. J. (Q.B.) 70.
(2) 3 H. & C. 541; 34 L. J. (Ex.) 72.
(3) 6 C. B. (N.S.) 679; 28 L. J. (C.P.) 315. 5 Jur. N.S. 1410
(4) 8 C. B. (N.S.) 617; 29 L. J. (C.P.) 335. 6 Jur. N.S. 1347
(5) 16 Ir. C. L. App. 9.

[28 L.C. 11 Jur. N.S. 164.

of some letters which he might refer to in mitigation of damages." Looking at all these circumstances, I think, and all my learned Brothers concur in the opinion, that the defendant is entitled to the inspection which he seeks.

1871

PAPE v. LISTER.

Rule absolute.

Attorneys for plaintiff: *Clarke & Son.*
Attorneys for defendant: *W. & J. Flower & Nussey.*

TOLEMAN *v.* PORTBURY AND OTHERS.

Jan. 25.

Ejectment—Forfeiture for Breach of Covenant—Waiver of Forfeiture by bringing Ejectment for Non-payment of subsequent Rent.

In ejectment by landlord under a proviso for re-entry on breach of covenant, the plaintiff, under an order for particulars, gave as breaches the permitting a sale by auction on the premises without the plaintiff's consent, and also the non-payment of several quarters rent which accrued after the date of the sale. The defendant then obtained a judge's order, under the Common Law Procedure Act, 1852, s. 212, staying the action as to the breach for non-payment of rent, on payment of the rent to the plaintiff, or into court if he refused it. The plaintiff refused the rent, and the money was paid into court. At the trial the forfeiture by the sale by auction was proved:—

Held, that there had been no waiver of the forfeiture.

EJECTMENT to recover possession of a house in Westbourne Grove, Bayswater, on a forfeiture for breaches of covenant in a lease.

The defendants let judgment go by default; but one Reed, as mortgagee of the lease, was let in to defend for the whole.

The writ was issued on the 1st of April, 1870 (1); and on the 3rd of May, particulars of breaches were delivered under a judge's order obtained by the defendant: viz., the non-payment of 366*l.* 15*s.* for three years rent of the premises, from the 25th of March, 1867, to the 25th of March, 1870; the permitting and suffering a sale by public auction to take place on the premises, on the 25th of May, 1867, without the consent in writing of the plaintiff, contrary to the covenant in the lease made between the plaintiff and R. W. Candler.

(1) A previous action had been brought, in which the plaintiff was nonsuited, failing to prove the forfeiture: see Law Rep. 5 Q. B. 288.

1871

TOLEMAN v. PORTBURY.

On the 9th of May, the defendant obtained a judge's order, under s. 212 of the Common Law Procedure Act, 1852, (15 & 16 Vict. c. 76) that, on payment by the defendant of the amount of rent found to be due by the master, with costs, &c., to the plaintiff or his attorney, or if refused by them, on payment of the amount into court, all proceedings in the action be stayed so far as relates to the breach for non-payment of rent. The amount of rent due was tendered to the plaintiff and refused on the 30th of May, and was then paid into court.

At the trial before Hannen, J., at the sittings in Middlesex, in Trinity Term, 1870, it appeared that the plaintiff by indenture of lease, of the 23rd of March, 1860, demised the premises to Candler, his executors, administrators and assigns, for twenty-one years, from the 25th of March, 1860, at the yearly rent of 122*l.* 5*s.*, payable on the usual quarter days. By the lease, Candler covenanted for himself, his executors, administrators and assigns, that he would not permit any sale by public auction to take place on the premises without the consent in writing of the plaintiff. And there was a proviso, that if the rent should be unpaid for twenty-one days after the days for payment, or in case of the breach of any of the covenants on the lessee's part therein contained, the lessor might re-enter upon the premises, and re-possess and hold the same as if the demise had not been made.

On the 22nd of April, 1867, Candler underlet the premises to Reed for fourteen years, minus three days, by way of mortgage, to secure the sum of 300*l.* On the 30th of April, 1867, Candler executed an assignment of all the goods and effects upon the premises; and on the 25th of May a sale by public auction under the bill of sale took place on the premises, without the consent in writing of the plaintiff.

The only question in dispute was, whether the sale took place by permission of Candler; this the jury found in the affirmative; and a verdict was entered for the plaintiff, with leave to move to enter it for the defendant.

A rule was obtained to enter a verdict for the defendant, on the ground that the forfeiture by permitting a sale by auction was waived by bringing this action of ejectment for forfeiture for non-payment of rent accrued due after knowledge by the plaintiff of

the sale by auction, and by the plaintiff treating the tenancy as existing after such knowledge.

J. Rose shewed cause. There has been no waiver by the plaintiff of the forfeiture incurred on the 25th of May, 1867; there had been no demand by him of any subsequent rent; and by the particulars of breaches he simply says, "If I fail in proving the forfeiture on the 25th of May, 1867, then I shall rely on the non-payment of subsequent rent;" but that is no such absolute statement of the continuance of the tenancy as to amount to a waiver. Two cases were relied on at the trial: *Doe* v. *Birch* (1), in which it was doubted whether a mere demand of subsequent rent would be a waiver of a forfeiture; and *Dendy* v. *Nicholl* (2), in which it was held that an action for subsequent rent is a waiver. Those cases are therefore no authority against the plaintiff. *Doe* v. *Meux* (3) is a direct authority in favour of the plaintiff. There Abbott, C.J., said, "I am clearly of opinion that the receipt of rent after an ejectment is brought on a forfeiture is no waiver of such forfeiture." In a considered judgment of the Court of Exchequer delivered by Parke, B., in *Jones* v. *Carter* (4), it is said, "We entirely agree in Lord Tenterden's opinion. The precise point that he decided was, that on the trial of an ejectment for a forfeiture (in which, of course, the entry was admitted), the receipt of rent after the bringing of that ejectment was too late, and the lease was not rendered valid. We think the same consequence follows from an entry admitted by the consent-rule; but even supposing no consent-rule to have been entered into, we think that the bringing of an ejectment for a forfeiture, and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease; and the option must be exercised once for all." The judgment of Erle, C.J., in *Ward* v. *Day* (5), is no authority to the contrary.

Prentice, Q.C., and *Baylis*, in support of the rule. The plaintiff, by bringing an ejectment for the rent accrued due subsequent to the forfeiture of the 25th of May, 1867, affirms the existence

(1) 1 M. & W. 402.
(2) 4 C. B. (N.S.) 376; 27 L. J. (C.P.) 220.
(3) 1 C. & P. 346.
(4) 15 M. & W. 718, 725.
(5) 5 B. & S. 359, 363; 33 L. J. (Q.B.) 254.

1871

TOLEMAN v. PORTBURY.

of the tenancy after that day, and that is therefore a waiver, according to the judgment of Erle, C.J., in *Ward* v. *Day* (1), and the cases cited in it. It cannot be a question of intention, if the landlord has done an unequivocal act, or even affirmed by word that the tenancy is existing. *Dendy* v. *Nicholl* (2) is a direct authority that bringing an action for subsequent rent is a waiver, and that is not more unequivocal than bringing ejectment on a forfeiture for non-payment of subsequent rent.

[BLACKBURN, J. The action of ejectment discloses nothing, it merely amounts to saying "You are no longer my tenant." The particulars of breaches are only a statement of what the plaintiff will endeavour to prove at the trial.]

In order to prove his case he must affirm that the tenancy was in existence after the 25th of May, 1867. In *Croft* v. *Lumley* (3), it was decided that the receipt of money paid by the tenant as rent, though the landlord is protesting at receiving it as such, amounted to a waiver, and that the landlord's protest was useless.

[HANNEN, J. Lord Wensleydale, when that case was in the House of Lords, expressed a strong dissent from that view, though it was not necessary to decide the point. (4)]

COCKBURN, J. I am of opinion that the rule must be discharged. No one would impugn the proposition that when a landlord, after a forfeiture has come to his knowledge, does anything whereby he recognizes the relation of landlord and tenant as still existing, he is precluded from saying he did not do the act with the intention of waiving the forfeiture; and if what had been done in the present case amounted to a recognition of an existing tenancy, I should at once agree that the plaintiff could not take advantage of the previous forfeiture. But I do not think that doctrine applies to a case in which what has been done by the landlord is merely a statement in the particulars of breaches in an action of ejectment, that he relies on a second ground of forfeiture, inconsistent though it be with the first. If he succeeds in proving any one ground of forfeiture, and so puts an end to the

(1) 5 B. & S. 359, 363; 33 L. J. (Q.B.) 254.

(2) 4 C. B. (N.S.) 376; 27 L. J. (C.P.) 220.

(3) 5 E. & B. 648; 25 L. J. (Q.B.) 73.

(4) 6 H. L. C. at p. 744; 27 L. J. (Q.B.) at p. 345.

lease, then *Jones* v. *Carter* (1) shews that all that takes place after the action was brought is immaterial; from that moment the lease is void, and he cannot derive any advantage on the ground of the tenancy continuing, or demand the rent. And therefore having succeeded on the first breach he could not have gone on and relied on the other breach. All that has passed amounts to this: the plaintiff says, "I bring my ejectment to recover possession because the lease is forfeited;" and when asked on what grounds, he says, first, for a forfeiture, by reason of having permitted an auction on the premises; but, secondly, he goes on to say, "If I do not establish that the relation of landlord and tenant was put an end to by the auction, I shall rely on the non-payment of rent; and that is my alternative ground of forfeiture." If he establishes the first ground, then he cannot go any further, because he has already shewn that the tenancy no longer subsisted, and he could not have a verdict on both breaches; and the defendant consequently will be entitled to get back the money which he paid into court on the supposition that there had been a breach of covenant in not paying the rent. What has taken place here is very different from any voluntary act or statement by the landlord before action brought; all that has been done was only to further the ends of the tenant. The tenant is entitled to ask for particulars of the forfeiture, the landlord is obliged to give them. The tenant takes advantage of the Common Law Procedure Act and pays money into court in satisfaction of the rent, and so gets rid of this alleged forfeiture. But that is not like voluntary receipt of the rent by the landlord, all that is done is done in adversum for the tenant's own benefit, and to exclude the landlord from relying on non-payment of rent as a forfeiture. The two things are essentially different. All the landlord has done is to state, "I rely upon a forfeiture by reason of the sale on the premises, but if I fail in that, and the tenancy be not shewn to have been forfeited by that, then, as the tenancy continued, I will shew that it has since been forfeited by non-payment of subsequent rent." In other words, "I have two strings to my bow, if the first fails, I shall use the second." It is clear, therefore, that the first forfeiture was not waived, and therefore the plaintiff is entitled to keep his verdict, and the rule must be discharged.

(1) 15 M. & W. 718.

1871

TOLEMAN v. PORTBURY.

BLACKBURN, J. I am of the same opinion. In *Jones* v. *Carter* (1), Lord Wensleydale quotes cases shewing it to be well settled law, that though the lease is declared to be void for breach of covenant, the true construction of the proviso is that it is void at the option of the lessor; "and consequently on the one hand, if the lessor exercises the option that it shall continue, the lease is rendered valid; if he elect that it shall end, the lease must be determined." And he proceeds to say, that this option to avoid the lease must be taken to have been exercised by the lessor, where an ejectment had been brought and proceeded with to the consent-rule, which admits an entry, and entry would certainly be an exercise of the option; and once determined, the lease could not be revived. And further, he goes on to shew, that the bringing of an ejectment for a forfeiture, and serving it on the tenant in possession, must be considered as the exercise of the lessor's option to determine the lease; and the option must be exercised once for all. The plaintiff by issuing his writ on the 1st of April, 1870, said, in effect, that the lease was at an end; he did not assign any reason, and the tenant might have given up possession; but the mortgagee of the lease is let in to defend, and he requires particulars of the breaches; and, accordingly, the plaintiff on the 3rd of May gives particulars, in which, as my Lord has shewn, he states alternative breaches, viz., a forfeiture by reason of permitting a sale on the premises, and a forfeiture by reason of the non-payment of rent. If the matter had stood there, and there had been no judge's order, or payment into court of the rent, could it be said that the mere statement that the plaintiff relied on a second breach of covenant was a waiver of the first? If it could be taken thus, as the counsel for the defendant has argued, the mere opening statement of counsel, or the statement of a variety of breaches in the particulars, would amount to a waiver of all except the last. The objection is much too technical to be allowed any weight in the present day. But then there comes a colour of equity: the defendant says, in consequence of the plaintiff setting up the second forfeiture for non-payment of rent, the plaintiff has gained this advantage, and the defendant has altered his position by proceeding under the Common Law Procedure Act, 1852, and paying

(1) 15 M. & W. at pp. 725, 726.

money into court. But the plaintiff refused to take, and has not taken this money; possibly the plaintiff ought, if he still relied on the first forfeiture, to have elected to do so, and abandoned the other. But it is too late to say that now. The question simply is, does the mere fact of this second breach having been stated, and the tenant consequently having paid money into court, amount to a waiver by the plaintiff of the first forfeiture? Surely not. The assertion that the plaintiff relies on two breaches does not shew that he relies on one more than the other, or that he has waived the first; and consequently the first breach being substantiated, *Jones* v. *Carter* (1) applies, and all acts subsequent to the writ are immaterial. The rule must therefore be discharged.

HANNEN, J. The effect of the ejectment is this: The landlord says, "I am entitled to the possession of the premises because you, the defendant, have ceased to be my tenant." Then the mortgagee, the person really interested, comes in and requires particulars, and the landlord then says, "I have several grounds for saying the tenancy is at an end. One, the tenant had permitted an auction on the premises; another, he did not pay the rent;" and he might go on and give any other breaches which he thought had worked a forfeiture. But how can it be inferred from his stating that his tenant had ceased to be his tenant because he did not do one thing, that the landlord is therefore electing to treat him as tenant notwithstanding he had committed the other breach? It would be altogether a forced and unnatural meaning to give to such a mere statement of breaches. Nor do I see that the matter is at all altered by the fact of the defendant having availed himself of the Common Law Procedure Act. He it was who made the application. He did it for the purpose of getting rid of the liability to be turned out for non-payment of rent. The defendant got this advantage contrary to the wishes of the plaintiff. If the plaintiff had received the money, the case might possibly be within *Dendy* v. *Nicholl* (2); but he did not receive the money, he merely submitted to the order, which he could not prevent. The tenant having said, "Do not let me be turned out on the ground of the

(1) 15 M. & W. 718.
(2) 4 C. B. (N.S.) 376; 27 L. J. (C.P.) 220.

1871

TOLEMAN v. PORTBURY.

non-payment of the rent, because I am ready to pay it," that ground of forfeiture was removed; but that left the question as to the other ground of forfeiture untouched and undetermined.

Rule discharged.

Attorneys for plaintiff: *Reed & Lovell.*
Attorney for defendant: *Elderton.*

Jan. 30.

THE QUEEN *v.* COCKERELL AND ANOTHER.

Sewage Utilization Acts, 1865, 1867—*Sanitary Act*, 1866 (29 & 30 *Vict. c.* 90), *ss.* 5, 7, 49—*Orders of Secretary of State—Order to a Sewer Authority limiting a Time to do its Duty—Order appointing a Person to do the Duty of the Sewer Authority.*

A sewer authority having made default in providing the necessary sewers for the district, the Secretary of State, under s. 49 of the Sanitary Act, 1866 (29 & 30 Vict. c. 90), made an order, which recited that the sewer authority had "made default in providing a proper system of main drainage," and proceeded, "I do order the said authority to do its duty, and begin to set about the works for the purpose within one month from the date of this order, and proceed therewith until completion." After the month, the sewer authority having done nothing, the secretary of state made a second order appointing J. B. "to perform the said duty of the sewer authority in respect to sewerage as he shall be directed by me:"—

Held, that the two orders were justified by the enactments of s. 49.

RULE, obtained on behalf of Walter Charles Metcalfe, calling upon two justices of Essex to shew cause why a writ of certiorari should not issue to bring up, for the purpose of quashing it, an order made by them on the 28th of October, 1870, whereby they authorized one Jabez Church to enter upon certain lands in the Epping special drainage district, belonging to Metcalfe, for the purpose of constructing a sewer through and under them; on the grounds that the justices had no jurisdiction to make the order; that the orders on which it was made are void, and were not properly served; that there was no sewer authority within the district; that no default was made by any sewer authority of the district; and that Jabez Church was not properly appointed to perform the duty of sewer authority.

After the passing of the Sewage Utilization Act, 1867 (30 & 31 Vict. c. 113), on a petition of the inhabitants, the Secretary of State

for the Home Department, acting under s. 8 of that Act, on the 13th of January, 1868, made an order settling the boundaries of the Epping special drainage district, which consisted of the town of Epping, and comprised parts of the three parishes of Epping, Theydon Garnon, and Theydon Bois. A copy of this order was duly published in the manner provided by s. 7 of the Sanitary Act, 1866 (29 & 30 Vict. c. 90.)

There were a minister, churchwardens, and overseers of each of the three parishes, and the Rev. Tay Leaver was the curate of the parish of Epping. None of the ministers, nor churchwardens, nor overseers, resided in the district; but Mr. Leaver resided in the district.

After the order was made, a meeting of persons residing within the district was held, and a committee of their body was appointed to inquire and report to the ratepayers generally as to the best mode of improving the sanitary condition of the district. But after holding several meetings the committee, doubting the power of the inhabitants of the district to convene meetings or levy a rate, tendered their resignation at a meeting of the persons residing within the district, held on the 5th of November, 1868, which resignation was accepted, and no other committee has since been appointed.

On the 14th of October, 1869, the Home Secretary made the following order: "Epping: Whereas complaint has been made to me, as one of Her Majesty's principal secretaries of state, that the sewer authority of the special drainage district of Epping, constituted in pursuance of the Sewage Utilization Act, 1867, has made default in providing its district with a proper system of main sewerage; and whereas I am satisfied, after due inquiry, that the said authority has been guilty of the said default, I do hereby make order on the said authority to do its duty in the matter of the said complaint, and begin to set about the works for the purpose within one month from the date of this order, and proceed therewith until completion."

This order was sent by post to the Rev. Tay Leaver, the curate of Epping parish, and it was read by him at a meeting held at the petty sessions room at Epping, within the district, on the 23rd of October, 1869; six days notice of the meeting having been given by Mr. Leaver by posting it on the doors of each of the three

1871

THE QUEEN v. COCKERELL.

parish churches of Epping, Theydon Garnon, and Theydon Bois, none of which churches are situate within the district. The meeting resolved, that not having been properly convened the meeting was not in a position to consider or discuss the subject.

On the 18th of November, 1869, the Home Secretary made the following order: "Epping, Sanitary Act, 1866: Whereas complaint has been made to me, as one of Her Majesty's principal secretaries of state, under s. 49 of the Sanitary Act, 1866 (29 & 30 Vict. c. 90), that the sewer authority of the special drainage district of Epping, constituted under the Sanitary and Sewage Utilization Acts, has made default in its duty under the said Acts in making proper provision for the sewerage of the said district; and whereas the said secretary of state, having satisfied himself after due inquiry that the said sewer authority had made such default, made an order in pursuance of the said section on the said sewer authority limiting a time for the performance of its duty in respect of such sewerage in which it had made default. And whereas the said duty not having [sic] been performed within the time limited in the said order, I do hereby appoint Jabez Church, civil engineer, of, &c., to perform the said duty of the sewer authority in respect to sewerage as he shall be directed by me."

Mr. Church commenced the works at once; and on the 30th of August, 1870, a formal notice was served on Metcalfe requesting permission to enter certain of his lands in order to construct the sewer through and under the same. Metcalfe refused to give permission; and on the 7th of October, 1870, after giving notice to Metcalfe, application was made to justices for an order under 11 & 12 Vict. c. 63, s. 143, and 28 & 29 Vict. c. 75, s. 5, authorizing Church as the sewer authority to enter Metcalfe's lands for the purpose of making the sewer. And after two adjournments the justices, on the 28th of October, 1870, made the order, which recited the orders of the secretary of state, &c., and authorized Church to enter, &c.

Sir R. P. Collier, A.G., shewed cause. The validity of the order of justices sought to be quashed depends upon the question whether Mr. Church was properly appointed to do the duty of the sewer authority in the Epping district; if he was, then, by s. 2 of

1871

THE QUEEN v. COCKERELL.

30 & 31 Vict. c. 113, he has the same powers as the sewer authority; and they have power to make sewers and to enter on lands under an order of magistrates, on refusal of permission by the owner, under 28 & 29 Vict. c. 75, ss. 4 and 5, and 11 & 12 Vict. c. 63, s. 143. The Court will not, after an order has been acted upon so long, interfere by certiorari, which is a discretionary writ: *Re Todmorden.* (1)

[BLACKBURN, J. In *Reg.* v. *Surrey* (2) we decided that when the person applying has a peculiar grievance of his own he is entitled to the writ of certiorari ex debito justitiæ, however little merits there may be.]

[The Attorney-General then stated the facts and proceedings as above set out, upon affidavits, and contended that what had been done was perfectly regular, and a proper compliance with the requirements of the various sections of the statutes, including 58 Geo. 3, c. 69, as amended by 7 Wm. 4 and 1 Vict. c. 45, and that this was shewn by ss. 3 and 4 of the Sanitary Act, 1870 (33 & 34 Vict. c. 53) (3), which if not retrospective, was at least

(1) 30 L. J. (Q.B.) 305; S.C. nom. *Ex parte Smith*, 1 B. & S. 412.

(2) Law Rep. 5 Q. B. 466.

(3) 33 & 34 Vict. c. 53, s. 3: Any notice which, by virtue of such provisions of the Act of 58 Geo. 3, c. 69, or of any of the Acts amending the same or incorporated therewith as are incorporated by the 5th section of the Sanitary Act, 1866, is required to be signed by the rector, vicar, or curate, or by a churchwarden or overseer of the poor of the parish, shall, in the case of any special drainage district made up of, including part of a *parish only*, or more than one parish, be signed by the rector, vicar, or curate, or by a churchwarden or overseer of the poor of any parish wholly or partly included in the district; and any notice which by the said Acts or any of them is required to be affixed on or near to the doors of all churches and chapels within the parish shall be affixed to the doors of any church or chapel in the special drainage district, or if there be no such church or chapel, then on the doors of all churches and chapels in the parish or parishes out of which the district has been constituted.

S. 4: Any order or demand of any of Her Majesty's principal secretaries of state under the Sanitary and Sewage Utilization Acts shall be deemed to have been duly served on the sewer authority of any district for the purposes of those Acts if served on or sent through the post in a registered letter addressed to any person appointed at a meeting of the sewer authority to receive service, of which appointment notice shall be given to such secretary of state, or if no such person shall have been appointed, or no notice of such appointment given to the secretary of state as aforesaid, or if the person so appointed shall refuse, neglect, or be unable to receive such service, then if served on or sent by the post as aforesaid to the rector, curate, or overseer, or the churchwarden or overseer of any parish wholly or partly included in the district: Provided, that nothing in this Act shall be taken to affect the pro-

1871

THE QUEEN v. COCKERELL.

declaratory, and enacted the very mode of proceeding which had been adopted in the present case.]

THE COURT then called upon

Sir J. B. Karslake, Q.C., W. B. Cooper, and *Beresford*, in support of the rule :—[They first contended that when a district consisted of parts of several parishes there was no sewer authority which could act under the several statutes, and that the notices, &c., had not been properly served, and the proceedings were altogether irregular and inoperative, the 33 & 34 Vict. c. 53, not being retrospective. The arguments on these points sufficiently appear from the judgment of Blackburn, J., and the points are of no consequence since the passing of 33 & 34 Vict. c. 53.]

Secondly, assuming the district to have been properly constituted, and a sewer authority capable of acting, the orders of the secretary of state directing the sewer authority to proceed and appointing Mr. Church the sewer authority are invalid. The orders are made under s. 49 (1) of the Act of 1866 (29 & 30 Vict. c. 90). The order of the 14th of October, 1869, recites that default has been made "in providing a proper system of main sewerage," this is

---

visions of the 5th section of the Sanitary Loans Act, 1869.

(1) 29 & 30 Vict. c. 90, s. 49:—Where complaint is made to one of Her Majesty's principal secretaries of state that a sewer authority or local board of health has made default in providing its district with sufficient sewers, or in the maintenance of existing sewers, or in providing its district with a supply of water in cases where danger arises to the health of the inhabitants from the insufficiency or unwholesomeness of the existing supply of water, and a proper supply can be got at a reasonable cost, or that a nuisance authority has made default in enforcing the provisions of the Nuisance Removal Acts, or that a local board has made default in enforcing the provisions of the Local Government Act, the said secretary of state, if satisfied after due inquiry made by him that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of its duty in the matter of such complaint; and if such duty is not performed by the time limited in the order, the said secretary of state shall appoint some person to perform the same, and shall, by order, direct that the expenses of performing the same, together with a reasonable remuneration to the person appointed for superintending such performance, and amounting to a sum specified in the order, together with the costs of the proceedings, shall be paid by the authority in default; and any order made for the payment of such costs and expenses may be removed into the Court of Queen's Bench, and be enforced in the same manner as if the same were an order of such court.

too large, the 49th and other sections only speak of providing sufficient sewers. Secondly, the order directs the sewer authority to do its duty, and "to begin to set about the works within one month;" whereas all that s. 49 enables the secretary of state to do is to make an order limiting a time for the performance of its duty; he may state a time within which the sewer authority shall perform its duty, that is, complete the work, and possibly they would be bound to begin within a reasonable time; but the secretary of state has no power to order them to begin within a limited time, and treat the not beginning as a non-performance of the duty. Lastly, the order appointing Mr. Church is erroneous and invalid, it appoints him to perform the duty "as he shall be directed by me;" and without any allusion to the expenses. The sewer authority had full power to adopt what scheme of sewerage they pleased; and when a person is appointed to do their duty, he also must have some definite scheme, which he would perhaps submit to the secretary of state in the first instance, but it must be a scheme definite in its objects, and of which the expenses could be estimated, and he ought then to be appointed to carry out this scheme, and the same order ought to make provision for the expenses.

[BLACKBURN, J. I do not find that in the section; an order is to be made as to the expenses, but the section does not say it is to be the same order as the order appointing the deputy; the remuneration has to be paid, and other expenses, it would seem, are to be ascertained from time to time, and an order made as convenience requires.]

There is nothing mentioned but a single order; and if the order for the expenses is not to be made till they have been incurred, it would involve the extreme inconvenience and injustice of throwing the whole expense, it may be of years, upon the unfortunate ratepayers when the work is completed.

[BLACKBURN J. That is a strong argument for saying that "order" does not mean one order, but that orders as to expenses may be made from time to time, and that an order of appointment need not refer to the expenses at all.]

[The Court intimated that they wished to hear the other side upon the last objection, viz., the alleged usurpation of authority

1871

THE QUEEN v. COCKERELL.

by the secretary of state in the last order, in appointing Mr. Church to perform the duty "as he shall be directed by me."]

Sir R. P. Collier, A.G., and *Sir J. D. Coleridge, S.G.* (with them *Poland* and *Archibald*), were accordingly heard on this point. The question is, not the absolute propriety of this order, but whether it is a sufficient appointment of Mr. Church as the sewer authority to justify the order made by the justices for his entry on Metcalfe's land. But in effect s. 49 authorizes the appointment of a deputy, as it were, of the secretary of state to act as the sewer authority, and not merely an independent official; the secretary of state is to make orders as to the expenses; and the subsequent Act of 1869 (32 & 33 Vict. c. 100) shews that the secretary of state is to retain the supervision of the matter; for after reciting the power of the secretary of state to appoint a person to perform the duty of a defaulting sewer authority, by s. 4, the secretary of state is empowered from time to time to certify the amount of expense incurred, or an estimate of the expense to be incurred, by the person appointed; and also of the amount of loan required to be raised for the expense incurred, or to be incurred; and by s. 5, on the certificate of the secretary of state, the Public Works Loan Commissioners may advance the money to the secretary of state, or to any person appointed by him, and he is to charge the loan on the local rates; and the certificate of the secretary of state certifying the loan, or appointing a person to perform the duty of a defaulting sewer authority, shall be conclusive evidence that all the requirements of s. 49 of the Act of 1866 have been complied with.

[They were then stopped by the Court.]

BLACKBURN, J. I think that this rule must be discharged. A great many different points have been raised depending upon the construction of the Acts of Parliament, and I will dispose first of those upon which Sir John Karslake mainly relied, that is, that what has been done by the secretary of state is altogether void, because there is no sewer authority in existence that could do anything; and, of course, if there was no sewer authority in existence that could do anything there could be no default; and I quite agree, if the legislature had altered the enactments in such a clumsy

way that the sewer authority could not work, that there would be no default in their not doing what they could not do. I can by no means approve the mode of legislation that has been adopted, nor do I retract any of the disparaging remarks that have been made in the course of the argument upon it; but I do not think it is subject to this particular vice, for the legislature have evaded this difficulty, at all events. First, I must call attention to the section which enables the Home Secretary to act in the formation of a district. It is s. 8 of the Sewage Utilization Act, 1867 (30 & 31 Vict. c. 113), and that enacts that, "Any inhabited place not having a known or defined boundary,"—that is the present case, three portions of three parishes are to be made into a new district,—"may petition one of Her Majesty's principal secretaries of state, in manner provided in the 16th section of the Local Government Act, 1858, to settle its boundaries for the purposes of the Sewage Utilization Act, 1865, and of this Act; and the secretary of state may, by order made in manner provided by the said section, settle the same accordingly, and from and after the date of such order the place shall be deemed to have been constituted a special drainage district for the purposes of the said Sewage Utilization Act, 1865, and of this Act." So that as soon as that order is made, supposing everything to be correctly done, the district becomes a special drainage district for the purposes of the Sewage Utilization Act, 1865, and this Act. And then it goes on to say: "A copy of the order of the secretary of state shall be published, in manner provided by the 7th section of the Sanitary Act, 1866, and that section shall be construed in reference to a special drainage district formed under this section as if the order of the said secretary of state were substituted for 'resolution of a sewer authority.'" That takes us back to s. 7 of the Sanitary Act, 1866 (29 & 30 Vict. c. 90), which we are to read as if it was quite different to what it is, and which I will accordingly, as the legislature have directed us to do, read, substituting "order of the secretary of state" for "resolution of a sewer authority," and then the section will run thus, "A copy of the order of the secretary of state forming a special drainage district shall be published by affixing a notice thereof to the church door of the parish in which the district is situate, or of the adjoining parish if

1871

THE QUEEN v. COCKERELL.

there be no church in the said parish, and by advertising notice thereof in some newspaper published, or circulating, in the county in which such district is situate;" then comes the important part, "and the production of a newspaper containing such advertisement . . . shall be evidence of the formation of such district; and after the expiration of three months from the date of the order of the secretary of state, forming the district, such district shall be presumed to have been duly formed, and no objection to the formation thereof shall be entertained in any legal proceedings whatever." Very much more than three months have elapsed since the order of the secretary of state was made and duly advertised. We must, therefore, take it that the order was also right, and no objection can now be taken to the manner in which it was obtained, and the manner it was acted upon; and we have, therefore, a district formed into a special drainage district for the purposes of the Sewage Utilization Act, 1865, and the Act of 1867. The Sanitary Act, 1866, is incorporated in the Act of 1865, and made part of it. (1) Then we have to see what are to be the consequences of the formation of a special drainage district, and we are to look again at the Act of 1866 (29 & 30 Vict. c. 90), s. 5, and there it is provided that, where the sewer authority of a district is a vestry, or a select vestry, it may, by resolution, at any meeting convened for the purpose after so many days notice, "form any part of such district into a special drainage district for the purposes of the Sewage Utilization Act, and thereupon such special drainage district shall, for the purposes of the Sewage Utilization Act, 1865, and the powers therein conferred, be deemed to be a parish in which a rate is levied for the maintenance of the poor, and of which a vestry is the sewer authority, subject, as respects any meeting of the inhabitants thereof in vestry, to the Act of 58 Geo. 3, c. 69, and the Acts amending the same; and any officer or officers who may from time to time be appointed by the sewer authority of such special drainage district for the purpose shall have, within that district, all the powers of levying a rate for the purpose of defraying the expenses and carrying the said Sewage Utilization Act into effect that they

(1) See s. 3 of 29 & 30 Vict. c. 90, which incorporates the *first part* of the Act with the Act of 1865.

would have if such district were such parish as aforesaid, and such rate were a rate for the relief of the poor, and they were duly appointed overseers of such parish." This is rather a peculiar piece of legislation. It says, when a sewer authority of a parish has separated a district from that parish, and made it into a special drainage district, that district which is not a parish, and which has not a poor-rate, shall be deemed to be a parish, and assess a poor-rate, and the quasi vestry who are to be summoned there shall be the inhabitants, according to Sturges Bourne's Act; and the person who is to levy the rate shall levy the same as if he was the overseer of the poor. Not a neat piece of legislation; but it is clear enough. The former Act—the Sewage Utilization Act, 1865 (28 & 29 Vict. c. 75, s. 3, & sch.)—says that "in parishes not within the jurisdiction of any sewer authority hereinbefore mentioned, and in which a rate is levied for the maintenance of the poor," the sewer authority shall be "the vestry, select vestry, or other body of persons acting by virtue of any Act of Parliament," &c. So that now we have, by virtue of the three statutes, comparing one with the other, this—that when the secretary of state's order, making a district which forms a portion of a parish into a separate drainage district, is once published, and three months have elapsed, that district is formed, and is to be considered a parish, though it is not one, and a rate made in it is to be considered as a poor-rate, and the inhabitants of that district are to be analogous to a vestry. But, says Sir John Karslake—and this was the gist of his argument—that is impossible, because Sturges Bourne's Act says that the vestry shall be a meeting of the inhabitants of the parish. Of course, when the district is not a parish, though for the purposes of the Act it is declared to be considered as a parish, this must be taken to mean that the meeting shall be of inhabitants of the district. Secondly, he says: When they hold a meeting under Sturges Bourne's Act, the chairman is to be the rector; and as this district consists of bits of three parishes, there is no rector in the district; and as there is no rector in the district, there is no chairman. As to this, if there is no rector, no rector can be present; and so, as the Act directs, some one else must be elected chairman. Then he says: Sturges Bourne's Act requires that the notices convening the vestry shall

1871

THE QUEEN v. COCKERELL.

be given by putting the notices upon the door of the church or chapel; and as this district consists of three portions of three parishes, and there is no church in the district, this cannot be done. But I do not think that can be allowed to defeat the intention of the legislature; and we must apply the cy-pres doctrine, inasmuch as the body is to be one exercising the functions of the vestry; and it seems to me, without the aid of the subsequent Act (33 & 34 Vict. c. 53, s. 3), that the mode in which these meetings were convened—namely, by the curate putting the notice on each of the three churches in each of the three parishes from which this district was cut out, is a proper mode of carrying out the directions of the Act of Parliament, and consequently that which has been done is good enough. The point, however, cannot arise again, because of the recent Act of Parliament (33 & 34 Vict. c. 33, s. 3). I quite agree with Sir John Karslake, that the Act is not retrospective, but it regulates the procedure in future; but I think that all is right, as it has been done in that way before; and consequently we arrive at the conclusion that there was a sewer authority consisting of the inhabitants of the district, and a sewer authority that could perfectly easily have carried out the duties that are conferred upon them, if they were minded so to do. But they did not act, and what did happen was, that the secretary of state proceeded under s. 49 of the Act of 1866 (29 & 30 Vict. c. 90), which enacts: "Where complaint is made to one of her Majesty's principal secretaries of state that a sewer authority has made default in providing its district with sufficient sewers, or in the maintenance of existing sewers, or in providing its district with a supply of water in cases where danger arises to the health of the inhabitants from insufficiency or unwholesomeness of the existing supply of water, and a proper supply can be got at a reasonable cost; or that a nuisance authority has made default in enforcing the provisions of the Nuisance Removal Acts; or that a local board has made default in enforcing the provisions of the Local Government Act; the said secretary of state, if satisfied, after due inquiry made by him, that the authority has been guilty of the alleged default, shall make an order limiting the time for the performance of its duty in the matter of such complaint." Here the complaint was made to the secretary of

state that this sewer authority would do nothing at all; and, in fact, they did nothing, alleging they were incompetent to do anything. He made inquiry, and was satisfied they had made default, and then he made the first order, under the 49th section—"Whereas complaint has been made to me, as one of her Majesty's principal secretaries of state, that the sewer authority of the special drainage district of Epping, constituted in pursuance of the Sewage Utilization Act, 1867, has made default in providing its district with a proper system of main drainage." Mr. Cooper makes a special demurrer to that, and says that the terms of the Act are that they are to provide the district with sufficient sewers; but this recital, that they have made default in not providing a proper system of main drainage, is the same thing; and I do not appreciate the force of that objection. The order goes on: "And whereas I am satisfied, after due inquiry, that the said authority has been guilty of the said default, I do hereby make order on the said authority to do its duty in the matter of the said complaint, and begin to set about the works for the purpose within one month from the date of this order, and proceed therewith until completion." It is said that, in prescribing that to them, he was wrong; that their duty was to begin within a reasonable time, and to proceed to completion; but that the Home Secretary had no authority to say: "You are to begin within a month," and treat the beginning as a duty; but ought to have said: "Begin speedily, and complete within the next ten years," if ten years was the period likely to be required; and until that ten years had elapsed there would be no default. This proposition seems to me to be monstrous. The duty to make the sewers involves in it beginning in a reasonable time; and I think the Home Secretary is justified in saying: "You shall begin within a month, and if you do not proceed with convenient speed I will make a fresh order. You must proceed within a month; and if you do not, I shall take it out of your hands;" and when the month had elapsed, and they had not done anything, I think there was a clear default.

Then the second order was made, which recites that complaint had been made that the local authority had not done its duty regarding the sewers; and "whereas the said secretary of state, having satisfied himself, after due inquiry, that the sewer authority had made

1871

THE QUEEN v. COCKERELL.

such default, made an order in pursuance of the said 49th section on the said sewer authority, limiting a time for the performance of its duty in respect of such sewerage in which it had made default as aforesaid; and whereas the said duty not having been performed within the time limited in the said order, I do hereby appoint Jabez Church, civil engineer, to perform the said duty of the sewer authority in respect to sewerage as he shall be directed by me." Upon that the objection is made, that by the latter words, "as he shall be directed by me," there was an assumption of jurisdiction in the Home Secretary which he had not, and that that vitiated the whole matter.

If the effect and scheme of the Act was, that the person, appointed to perform the duty in the terms of the 49th section, was to be absolutely substituted for the sewer authority, and was to have the same discretion that the sewer authority alone had—for instance, if there were two rival schemes of drainage, and it might be doubtful which was best, it is clear the sewer authority would have the right to choose the one they thought best, and no secretary of state could control them and say: "You shall do one or the other;" and he could not say that doing the other was a default, and this Court would not hold it was. If the effect of appointing the person under s. 49 was to substitute another absolute sewer authority for the authority in default, and that new sewer authority had a discretion to exercise, then I think the reservation by the Home Secretary to himself of the power might make a difference. But I can hardly think, looking at the form of the 49th section, that that is the meaning of the Act at all. What is to be done is, when the secretary of state is satisfied that the sewer authority has been guilty of the alleged default, then he shall appoint some person to perform the same, that is the duty. Then it prescribes that he shall provide a reasonable remuneration to the person appointed for superintending such performance. I cannot help thinking that the person superintending, who is to be remunerated, is the same person as the person appointed to perform the duty, and it shews that what the legislature contemplated he was to do was to superintend the performance of the matter; and as the Attorney-General said, and it struck me to be the key of the whole thing, it meant, if they will not do their duty, the

secretary of state may do it for them, but as he cannot do it himself he may appoint a person to do it for him. That person shall be his deputy, and shall be subject to his control, and consequently what is expressed in this order would be implied there; and that is greatly fortified, in my mind, by the subsequent legislation, where they refer to the mode in which money is to be borrowed. Every one of the sections in that Act of Parliament (32 & 33 Vict. c. 100) points out that the secretary of state is to retain control; he is to estimate the amount; he is to certify the expenses. The secretary of state is to do many other things which, if he is doing the work by his deputy, he has the control over, but which, if he has appointed an independent person to do it, would necessitate a deal of inquiry. That greatly fortifies the conclusion I have come to, that what was meant by s. 49 was, that the person who was to do the duty was to be a person to be appointed as a deputy of the secretary of state, and consequently to be subject to his direction and control, and the words of the order do no more than express that. There is no other question that requires answering; and the result is that, in my opinion, the rule should be discharged.

MELLOR, J. I am of the same opinion, though I quite agree that this writ is ex debito justitiæ in a case like the present; yet we are called upon, before we grant a certiorari to remove such an order as this, for the purpose of quashing it, to see that an excess of jurisdiction has been committed. I am not able to come to that conclusion. I shall not follow my Brother Blackburn through the various sections to which he has referred. I entirely agree in the observations he has made, and I think the whole of the arguments with reference to the want of jurisdiction have been brought before us, but when one comes to look at the Acts of Parliament to which they relate, they appear not well founded. With reference to the order of the 14th of October, I think the construction of s. 49, contended for by Sir John Karslake, would lead to grievous injustice, and would be almost impossible to be carried out, because it would be impossible to tell precisely the expense or the duration of time, and I think the more liberal interpretation of the words which my Brother Blackburn has suggested is the true one, and that the

1871

THE QUEEN v. COCKERELL.

secretary of state can appoint a time for commencement of the work. When he finds that the persons whose duty it is to have made the sewer have done nothing, it is necessary to appoint a time for them to set about it; and I think it would be impossible for him with any certainty to predict when the works would be finished. That being the state of things, I think we are justified in the reading adopted by my Brother Blackburn.

Then with reference to the objection to the last order, I confess I was in doubt as to whether it did not assume a jurisdiction that did not belong to the secretary of state, but the arguments of the Attorney and Solicitor General have enabled me to make up my mind upon the matter. I think the order, when it says, "I do hereby appoint Jabez Church to perform the said duty of the sewer authority in respect to sewerage as he shall be directed by me," really means no more than what s. 49 enacts, that as the duty of the sewer authority is to be performed by a person appointed by the secretary of state, who cannot do it himself, the directions are incident to the performance of that which the secretary of state was bound to direct to be done. I therefore come to the conclusion that the rule ought to be discharged.

HANNEN, J., concurred.

Rule discharged.

Attorneys for applicant: *Tamplin & Taylor.*
Attorney for defendants: *Solicitor to the Treasury.*

Feb. 4.

[IN THE EXCHEQUER CHAMBER.]

THOMAS *v.* THE RHYMNEY RAILWAY COMPANY.

Railway Company—Negligence—Liability of Company to Passenger for Accident caused by Negligence of Company over whose Line they have Running Powers—Contract of Railway Company on giving a Passenger a Ticket.

The plaintiff took a ticket of the defendants, a railway company, as a passenger from A. to C. At B., between A. and C., the defendants' line joins the line of the T. V. Company, over which the defendants have running powers from B. to C., on payment of certain tolls, the traffic arrangements being left in the control of the T. V. Company, and the station at B. belonging to and being in the exclusive control of the T. V. Company. After leaving B., it being after dark, the train of the defendants in which the plaintiff rode ran into a train of the T. V. Company,

and the plaintiff was injured by the collision. The defendants' servants were guilty of no negligence; and the collision was owing to the negligence of the servants of the T. V. Company in sending on their own train without the proper tail light, and allowing the defendants' train to proceed on the same line of rails too soon after the other train without giving any warning to the driver of the defendants' train:—

Held, that the defendants were liable for the negligence of the T. V. Co.; for that the contract into which a railway company enters with a passenger on giving him a ticket between two places is the same, whether the journey be entirely over their own line or partly over the line of another company, and whether the passage over the other line be under an agreement to share profits, or simply under running powers: viz., that due care shall be used in carrying the passenger from one end of the journey to the other, so far as is within the compass of railway management.

So *held*, by Willes, J., and Bramwell, B., on the authority of *Great Western Ry. Co.* v. *Blake* (7 H. & N. 987; 31 L. J. (Ex.) 346); by the rest of the Court both on principle and authority.

APPEAL from the decision of the Court of Queen's Bench making absolute a rule to enter a verdict for the plaintiff.

The declaration alleged that defendants were carriers by railway, and plaintiff became a passenger, to be carried with due care by defendants; that defendants so negligently conducted themselves in carrying plaintiff that the train in which plaintiff was came in collision with an engine and van on the railway, whereby plaintiff was injured.

Pleas: Not guilty: and that plaintiff was not a passenger as alleged. Issue thereon.

At the trial before Kelly, C.B., at the Glamorganshire Spring Assizes, 1869, it appeared that the plaintiff took a ticket of the defendants, a railway company, from "Caerphilly to Cardiff." At Llandaff Station, between those two places, the defendants' line joins the line of the Taff Vale Railway Company, over which the defendants have running powers, by 20 & 21 Vict. c. cxl., from Llandaff to Cardiff, on payment of certain tolls; the traffic arrangements being left, by s. 84 of the Act, in the control of the Taff Vale Railway Company, subject, in the case of objection by the defendants, to arbitration under the Railways Clauses Consolidation Act, 1845. The Llandaff Station is a station belonging to and under the exclusive control of the Taff Vale Company.

The defendants' train, in which the plaintiff was travelling, having arrived at Llandaff station, was allowed by the station-

1871

THOMAS v. RHYMNEY RAILWAY CO.

master to leave the station for Cardiff only three minutes after an engine and tender of the Taff Vale Company had started on the same line of rails; and, it being after dark, the defendants' train ran into the engine and tender, and the plaintiff was injured by the collision.

In answer to questions by the Lord Chief Baron, the jury acquitted the defendants' servants in charge of the defendants' train of all negligence; and found, in effect, that the collision was owing to the negligence of the servants of the Taff Vale Company in sending on their own engine and tender without a proper tail light, and in allowing the defendants' train to proceed on the same line of rails too soon after the other train, and without giving any warning to the driver of the defendants' train that there was another train just ahead of him.

On this finding, the verdict was entered for the defendants; with leave to the plaintiff to move to enter a verdict for 450*l.*, if the Court should be of opinion that, under the circumstances, the defendants were liable for the negligence of the Taff Vale Company.

A rule having been obtained accordingly, the Court of Queen's Bench made it absolute (1), on the authority of *Great Western Ry. Co.* v. *Blake* (2), and *Buxton* v. *North Eastern Ry. Co.* (3).

H. G. Allen (*Field, Q.C.*, with him) for the defendants. In this case the defendants had only running powers over the line of the Taff Vale Company, and were themselves guilty of no negligence. The judgment of the Court below proceeded simply on the authority of *Great Western Ry. Co.* v. *Blake* (2), and *Buxton* v. *North Eastern Ry. Co.* (3), in which there were agreements between the companies. But Mellor, J., expressed an opinion against the liability of a company situate like the present defendants, as he had in *Blake's Case* (2); and Lush, J., thought the distinction most material, which had not occurred to him when taking part in *Buxton's Case.* (3) It is true that in *Blake's Case* (2), Byles, J., expressly includes the present case, and Cockburn, C.J., uses language wide enough to include it; but the point was not necessary to the decision of the case, nor was it necessary, as far as appears, in *Buxton's Case.* (3) The point

(1) See Law Rep. 5 Q. B. 226. (2) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(3) Law Rep. 3 Q. B. 549.

therefore really comes before the Court to be decided for the first time. When two companies have mutual agreements to share profits each becomes the agent of the other, and that other is of course liable for the negligence of the agent; but when a railway company undertakes to carry a passenger over the line of another company, with only running powers over the other line, the contracting company is precisely in the position of a stage-coach proprietor at common law; and the Railways Clauses Consolidation Act, 8 Vict. c. 20, s. 89, expressly confines a railway company's liability to that of a stage-coach proprietor; that is, the defendants contracted to carry the plaintiff with all reasonable care, so far as all and everything over whom and which they have control; but they are not liable for the negligence of the Taff Vale Company who are strangers. *Birkett* v. *Whitehaven Ry. Co.* (1), cited in the court below for the plaintiff, is really no authority in his favour, the point now raised was merely casually adverted to by the Court; but the defendants themselves had control over the switch although on the line of another company, and Bramwell, B., in the course of the argument uses expressions shewing what his opinion was, and in his judgment he expressly guards himself against deciding that a railway company undertakes for the safety of other lines over which its trains travel. (2) In *Redhead* v. *Midland Ry. Co.* (3), Lush, J., cites Story on Bailments, § 601, to the effect that the undertaking of a carrier of passengers "is not an undertaking absolutely to carry safely," but only to exercise "due care and diligence in the performance of his duty;" and the learned judge afterwards adds, that he did not feel it necessary to review the cases bearing on this liability, they do not carry the liability further than Story states it. "In all of them, where it has become necessary to define that liability, the judges have carefully distinguished between a carrier of passengers and a carrier of goods, and have pointedly declared that the liability of the former stands on the ground of negligence alone." That case, in the Court of Exchequer Chamber (4), expressly limits the liability of a railway company to due care by themselves and on the part of all over whom they have any control. It is expressly found in the present

(1) 4 H. & N. 730; 28 L. J. (Ex.) 348.
(2) 4 H. & N. at pp. 733, 738.
(3) Law Rep. 2 Q. B. at pp. 417, 419.
(4) Law Rep. 4 Q. B. 379.

1871

THOMAS v. RHYMNEY RAILWAY CO.

case that the defendants are bound by the Taff Vale Company's arrangements, and have no control whatever over the line after it reaches the Llandaff Station. *John* v. *Bacon* (1) may be cited by the other side; but in that case the defendants had servants on board the hulk, and in some sense had control over the gangway which caused the accident.

G. B. Hughes (with him *H. S. Giffard, Q.C.*), for the plaintiff. The principle of the decision in *Great Western Ry. Co.* v. *Blake* (2) and in *Buxton* v. *Midland Ry. Co.* (3) is, that a railway company by undertaking to carry a passenger between two places contracts that he shall be carried with safety.

[BRAMWELL, B. What if a stranger puts an obstruction on the line?]

The company would not be liable for that: *Latch* v. *Rumner Ry. Co.* (4). The contract is, that due care shall be used so far as the railway management is concerned, railway companies being in a different position from a coach proprietor, as they have the control of the road as well as of the carriage.

[CHANNELL, B. Might not the defendants have put special terms into their contract?]

No doubt: but having simply contracted to carry the plaintiff from Caerphilly to Cardiff, they have assumed for the purposes of that contract that they are the owners of the whole line, and that conventional state of facts binds them: *M'Cance* v. *London and North Western Ry. Co.* (5) That the above was the principle of the decision in *Great Western Ry. Co.* v. *Blake* (2) is shewn by the case of *John* v. *Bacon* (6), in which Bovill, C.J., says that the ground of the decision was "that there was a contract with the plaintiff that he should be carried throughout the journey for which the ticket was issued with reasonable care;" and Keating, J., said "That case was decided on the ground that the defendants, by their contract with their passengers, had undertaken that due care for their safety should be used during the whole course of their journey. My Lord was engaged as counsel in the case, and I was one of the

(1) Law Rep. 5 C. P. 437.
(2) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(3) Law Rep. 3 Q. B. 549.
(4) 27 L. J. (Ex.) 155.
(5) 3 H. & C. 343; 34 L. J. (Ex.) 39.
(6) Law Rep. 5 C. P. at pp. 441, 442.

judges by whom it was decided, and my recollection confirms my Lord's that that was the only ground on which it was decided. . . ."

[KEATING, J. I certainly understood that to be the sole ground of the decision.]

Buxton v. *North Eastern Ry. Co.* (1) was argued and decided on the assumption that *Blake's Case* (2) proceeded on this broad ground. In *Birkett* v. *Whitehaven Ry. Co.* (3), Bramwell, B., was the only judge who expressed any doubt as to the liability of the defendants by reason of their contract of carriage, whichever company was guilty of the negligence. As long ago as 1841, in *Muschamp* v. *Lancaster, &c., Ry. Co.* (4), Rolfe, B., put the very point: "If I book my place at Euston Square and pay to be carried to York, and am injured by the negligence of somebody between Euston Square and York, I do not know why I am not to have my remedy against the party who so contracted to carry me to York." The principle of the decision in *Mytton* v. *Midland Ry. Co.* (5) in fact concludes the present question; it was there held that when a passenger had taken a ticket of a particular company to be carried through over another company's line, the contract was an entire contract with the company giving the ticket, and no action for negligence would lie against the other company. The same principle has been adopted in the American courts: *Weed* v. *Saratoga Railroad Co.* (6)

H. G. Allen, in reply.

KELLY, C.B. In this case we had at first proposed to consider our judgment, but as we are all agreed that the decision of the Court below should be affirmed, it may be as well if we dispose of it at once.

It is true there may be distinctions as to the facts of the case between this and any one of the several cases which have been decided, in which the defendants, the railway company, have been held liable in an action for negligence, although there may have been no actual negligence in themselves, but the negligence, if any, was ascribable to another company.

(1) Law Rep. 3 Q. B. 549.
(2) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(3) 4 H. & N. 730; 28 L. J. (Ex.) 348.
(4) 8 M. & W. at p. 430.
(5) 4 H. & N. 615; 28 L. J. (Ex.) 385.
(6) 19 Wend. 534.

1871

THOMAS v. RHYMNEY RAILWAY CO.

In this case the defendants issued a ticket to the plaintiff from Caerphilly to Cardiff, and received the amount of the fare as a consideration for the contract into which they entered to carry the plaintiff from Caerphilly to Cardiff; and we are of opinion, or rather, I should say, the majority of the Court are of opinion, both upon principle and authority, that the company by the granting of that ticket entered into a contract that due and reasonable care should be taken that the plaintiff should be conveyed in safety upon the entire journey. It turns out that a part of the line over which the plaintiff was to be conveyed belonged to another company, and that the defendants used the line under what are called running powers pursuant to an Act of Parliament. The question is whether that makes any difference, or whether the case is not concluded by the decision in the case of *Great Western Ry. Co.* v. *Blake* (1), which being a decision of the Court of Exchequer Chamber is binding upon us, as it is upon each of the Courts in Westminster Hall. In that case a ticket was granted under circumstances similar to the present, save as to the relation or the contract between the company granting the ticket and the other company over whose line a part of the journey was to be performed. The decision of the Exchequer Chamber was, that although in order to convey the plaintiff upon the journey upon which the defendants had undertaken to convey him it was necessary to pass over the line of another company, and it was owing to the negligence of that other company that the mischief had occurred of which the plaintiff complained, still by the granting of that ticket the defendants entered into a contract with the plaintiff that he should be carried from one end of the journey to the other with reasonable care and attention. Looking to the facts of that case we find that the passage over the other company's line was not under running powers, but under some contract, possibly for participation of profits, or under some arrangement or other which made the two companies quasi partners, whereas in the present case it is in pursuance of running powers under an Act of Parliament that a portion of the Taff Vale Railway is used by the defendants, and the question is, whether that makes any difference, or whether this case is not, upon principle, within the effect of that judgment? I believe

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346.

we all think it is, and if that judgment is binding upon us it really determines this case.

I feel bound to add for myself and on behalf of several of the judges who have taken part in the hearing of this case, that, independently of the decision of *Great Western Ry. Co.* v. *Blake* (1), where a railway company issues a ticket for a journey in the course of which the train which conveys the passenger has to pass along a portion of a line of railway belonging to another company (whether it be under running powers, or whether it be under any particular contract for a participation in profits or otherwise), the contract between the railway company and the traveller to whom such ticket is issued is, upon every principle of the law, a contract not only that they will not themselves be guilty of any negligence, but that the passenger shall be carried with due and reasonable care along the whole line from one end of the journey to the other.

The case of *Buxton* v. *North Eastern Ry. Co.* (2) was cited among other cases. That case was tried before me; and there, although it was quite clear that the mischief complained of did not arise from the negligence of the defendants, but from the negligence of the Midland Railway Company, the owners of the intermediate portion of the line over which the traveller had to be conveyed, still it did not occur either to the counsel at the trial or to myself that that made any difference; and I am still of opinion, upon every principle of law, justice, and reason, when a ticket is issued, say, for example, at Euston Square Station, for the conveyance of a passenger to Edinburgh, or still further north, where the traveller may in the course of his journey have to pass over several lines of railway belonging to different companies, that the contract which was entered into by the company that issues the ticket is a contract that reasonable care shall be exercised by all by whom exercise of care is necessary for the reasonably safe conveyance of the passenger from one end of the journey to the other. The company who issued the ticket received the entire consideration. It certainly appears to me to make no more difference that they are enabled to carry the passengers along a portion of the line under some arrangement with another company than if it were their own line, and a portion of it were kept in repair under a

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346. (2) Law Rep. 3 Q. B. 549.

1871

THOMAS v. RHYMNEY RAILWAY CO.

contract with some persons who were in the habit, for a due consideration, of effecting repairs for railway companies, which certainly would not exempt the company from the obligations imposed on it. The only difference is, that they perform some part of their contract by means of contracts or arrangements with other persons. The contract with the passenger is, as I have already observed, for the reasonably safe conveyance of the passenger from one end of the journey to the other. They receive the consideration or remuneration for the undertaking into which they enter, and it appears to me that, so far as anything that may come within (to adopt the expression which has been well used in the course of the argument) the compass of railway management, if in consequence of any negligence on any portion of the line, from one end of the line to the other, a mischief occurs to the passenger, he is entitled to maintain an action against the company with whom he contracted for his safe conveyance from one end of the journey to the other.

I may as well add, that we must not be considered as holding that where the mischief complained of has arisen from the act of a stranger, such as would arise from any mischievous person leaving a log of wood across the railway, or any other act which might endanger a railway train passing along, an action would be maintainable against the railway company, because in that case there would not be any direct or indirect breach of duty or breach of contract on their part. They would not be liable on their own line, or on any other company's line, for that; and therefore our judgment must be considered to be limited to mischief arising to a passenger in a railway train from some negligence or other of that one of the companies which is owner of that portion of the line over which the party complaining of the injury is travelling. The judgment must therefore be affirmed.

BRAMWELL, B. I have to say on behalf of my Brother Willes (who has just left the court) and myself that we think this case is governed by the case in this court of *Great Western Ry. Co.* v. *Blake* (1); and that there is no distinction between the two cases upon which we should feel ourselves warranted (supposing we should

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346.

feel otherwise inclined to do it) in coming to a different conclusion from that which is arrived at by the decision in that case; and most certainly there is ground for saying that the judges who decided that case, or at least the majority of them, did not decide it on a different principle from that on which we decide this case. Therefore we think we are governed by that case, and we concur in giving judgment for the plaintiff in affirmance of the judgment of the Court below.

For my own part, I will add this: If I were counsel for the defendants in an action of this sort, I would take the objection of variance, and would drive the plaintiff to amend; and I should like to see very much what sort of declaration, under the circumstances, he would make of it.

MONTAGUE SMITH, J. I only wish to say one word upon the point of pleading, in consequence of what has fallen from my Brother Bramwell. I imagine there would be very little difficulty in drawing the declaration so as to embrace this kind of negligence, the negligence of others, not the immediate servants of the railway company. It would only be necessary to state a promise on the part of the defendants that due and reasonable care should be used in carrying the passenger from one end of the journey to the other.

CHANNELL and CLEASBY, BB., KEATING and BRETT, JJ., concurred in the judgment delivered by the Lord Chief Baron.

Judgment affirmed.

Attorneys for plaintiff: *Field & Roscoe, for B. Matthews, Cardiff.*
Attorney for defendants: *W. G. Roy.*

1871
Jan. 16.

RICHARDSON *v.* WILLIAMSON AND LAWSON.

Warranty of Authority by Agent—Action against Directors of Company borrowing Money without Authority.

The plaintiff lent 70*l.* to a benefit building society, and received a receipt signed by the defendants as two directors of the society, certifying that the plaintiff had deposited 70*l.* with the society for three months certain, to be repaid with interest after fourteen days notice. The society was formed under 6 & 7 Wm. 4, c. 32, and had no power to borrow money; and the plaintiff, being unable to get her money back from the society, sued the defendants. On the above facts the Court having power to draw inferences:—

Held, that the defendants were liable to the plaintiff in damages for a breach of warranty of authority, they having, by signing the receipt, in effect represented that they had authority to make a binding contract of loan on behalf of the society, and so induced the plaintiff to part with her money.

DECLARATION on the common money counts.

Plea: never indebted. Issue joined.

At the trial before Hannen, J., at the London sittings after Easter term, 1870, it appeared that the action was brought to recover 50*l.*, the balance of 70*l.*, which the plaintiff had lent to The Imperial Permanent Benefit Building Society, on the deposit of which she received the following document, stamped as a receipt, signed by the two defendants, who were directors of the society:—

"Imperial Permanent Benefit Building Society,
"London, 17th June, 1867.

"This is to certify that Mrs. A. E. Richardson, of, &c., has this day deposited the sum of 70*l.* with the Imperial Permanent Benefit Building Society for a period of three months certain, upon which interest at the rate of 5*l.* per cent. per annum will be allowed.

"J. W. Williamson,
"C. L. Lawson, } Directors.

"Wm. Richardson, Secretary.

"Memorandum.—The above deposit may be withdrawn at any time subsequent to 17th Sept., 1867, upon receipt of fourteen days previous notice of such intended withdrawal."

The plaintiff withdrew 20*l.* on the 7th of May, 1868, and after giving notice to withdraw the rest, she was unable to obtain

it; and a correspondence ensued, in which the defendants said there were plenty of funds, but not immediately available. Being unable to get her money, the plaintiff took legal advice, and was advised that she had no remedy against the society, which was established under the Benefit Building Societies Act (6 & 7 Wm. 4, c. 32), and the rules of the society containing no power to borrow money; she accordingly brought the present action, seeking to make the defendants personally liable.

On these facts a verdict was taken by consent for the plaintiff for the amount claimed, with interest, with leave to move to enter a verdict for the defendants; the Court to be at liberty to draw inferences of fact, and to amend the declaration in any way they might think proper.

A rule was accordingly obtained to enter a verdict for the defendants, on the ground that the defendants were not personally liable to repay the sum sued for, or to be sued in this form of action.

R. E. Turner shewed cause. The society had no power to borrow money, there being no special authority to do so in the rules; and the plaintiff had, therefore, no remedy against the society: *In re National Permanent Benefit Building Society.* (1) Possibly the common counts will not lie against the defendants; but the Court has power to amend the declaration in any way it thinks proper, and, on the principle of *Collen* v. *Wright* (2), the defendants are liable to the plaintiff, she having been induced to act upon what amounted to a representation on the defendants' part that they had authority — which they had not — to borrow money on behalf of the society, and to enter into a binding contract with the plaintiff on behalf of the society.

THE COURT then called upon

M. Chambers, Q.C., and *Will*, in support of the rule. It is clear that the plaintiff looked only to the funds of the society for repayment; she therefore cannot sue the defendants. In *Mare* v. *Charles* (3) the defendant was held personally liable on his accep-

(1) Law Rep. 5 Ch. Ap. 309.
(2) 7 E. & B. 301; 26 L. J. (Q.B.) 215.
(3) 5 E. & B. 978; 25 L. J. (Q.B.) 119.

1871

RICHARDSON v. WILLIAMSON.

tance, though expressly said to be on behalf of a company; but that was on the technical ground that the defendant was named as the drawee of the bill, and that there could be no valid acceptance except by the drawee. But in *Lindus* v. *Melrose* (1), where the defendants, as three of the directors, signed a promissory note, and jointly promised to pay 600*l.* for value received in stock on account of the London and Birmingham Hardware Company, Limited, it was held that this did not bind the defendants personally. That is precisely the present case. There was no representation whatever on the part of the defendants; they simply signed their names to a receipt by which they acknowledged that they had received, on behalf of the society, 70*l.* from the plaintiff, which was perfectly true. In *Re National Permanent Benefit Building Society* (2) the directors were shewn to have issued a prospectus in which they chose to say "that they had made arrangements to borrow sums to be advanced to such members as desire to receive an advance before their turn for it regularly arrives, such members, of course, paying interest on the sum lent until their turn arrives." And Giffard, L.J., on this observes: "If we look at the nature of the company, that can only amount to this: that the directors have chosen to pledge their personal liability." The prospectus was not in evidence in the present case, and the mere fact of the defendants signing a certificate as directors on behalf of the company cannot amount to pledging their personal liability.

[BLACKBURN, J. That is not the cause of action. It must be taken that the declaration has been amended as suggested.]

COCKBURN, C.J. The defendants as directors appear to have proceeded to borrow money on behalf of the society without ascertaining whether they had power to do so, and they apply to the public to advance money on the faith of the solvency and liability of the society. It turns out that they had no authority to do this, the society having no power to borrow money. It cannot be supposed that the plaintiff on lending money to the society did so with the knowledge that the society was not authorized to

(1) 2 H. & N. 293; 3 H. & N. 177; 27 L. J. (Ex.) 326.
(2) Law Rep. 5 Ch. Ap. at p. 312.

(1) S.C. 3 Jur. N.S. 619; 4 Jur. N.S. 488

1871

RICHARDSON v. WILLIAMSON.

borrow; and it was not till she wanted her money back that she ascertained the real position of affairs, and is met by the defence that the society is not liable. Fortunately, there is a mode by which persons acting as the defendants have done can be reached, and the loss thrown on the right parties. By the law of England, persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority, may be sued for damages for the breach of an implied warranty of authority. This was decided in *Collen* v. *Wright* (1) and other cases; and the necessary amendment may be made in the present case. Then I think upon the facts the inference is, that the defendants do represent upon this instrument that they are authorized on behalf of the society to borrow money, and that the society will be liable on this contract of loan. It is quite true, as the defendants' counsel contended, that the plaintiff intended to deal with the society; and the ground of the amended cause of action is that the defendants induced her to deal with the society by representing they had authority when they had not.

BLACKBURN, J. I am of the same opinion. It appears that the plaintiff on advancing her money received a certificate, signed by two directors, that she had deposited the money with the society for three months, and that after that it would be repaid with interest after fourteen days notice. I think it clear that the defendants, the two directors who signed this certificate, did by that represent that they had authority to borrow the money on behalf of the society, and that the society would be bound to repay it on proper demand. As they had no such authority, it follows, on the principle of the decision in *Collen* v. *Wright* (1), that the plaintiff is entitled to recover from the defendants the damages she has suffered from not being able to sue the society, on shewing that the defendants professed to be able to bind the society. But as the declaration only contains the common money counts, it will be necessary that an amendment should be made. Had the society been insolvent the damages would have been possibly nil. The correspondence shews that the

(1) 7 E. & B. 301; 26 L. J. (Q.B.) 147; 8 E. & B. 647; 27 L. J. (Q.B.) 215.

3 Jur. N. S. 363, 4 Jur. N. S. 358.

1

1871

RICHARDSON v. WILLIAMSON.

society has ample funds, and, therefore, the damages will be the same as what she would have recovered from the society had it been liable, that is, the amount of her loan and interest.

MELLOR, J., concurred.

HANNEN, J. I am of the same opinion. Assuming the amendment to have been made, the cause of action would have been proved by shewing that the plaintiff had been induced to alter her position and part with her money by the defendants, in effect, representing that they had authority on behalf of the society to give her a binding certificate of indebtedness.

Rule discharged.

Attorneys for plaintiff: *J. & R. Gole.*
Attorneys for defendants: *Brady & Sons.*

Jan. 28.

EX PARTE FERGUSON AND HUTCHINSON.

Merchant Shipping Acts, 1854 *and* 1862 (17 & 18 *Vict. c.* 104, *ss.* 2, 241, 242, 432, 433; 25 & 26 *Vict. c.* 63, *ss.* 23, 33)—*Loss of Life by Collision of two Ships—"Ship" within Acts—Person "in charge"—Jurisdiction of Justices to suspend Certificate.*

An English steamer ran down a fishing coble off the coast; no injury ensued to the steamer or to any one on board of her, but the coble sank, and three of her crew were drowned. The master of the steamer was below, and the mate was in charge of the deck. The master came up soon after the collision, but neither the mate nor the master took any steps to save the men. An inquest was held on one of the bodies, and the Board of Trade instructed an attorney to attend and report upon it. He reported the result of the inquest, and sent the notes he had taken of the evidence given before the coroner. The Board of Trade directed that an investigation should be instituted, and, on the requisition of the solicitor to the Board, two justices, assisted by two nautical assessors, held an inquiry. Before the inquiry notice was served on the master and mate of the steamer, that in pursuance of the Merchant Shipping Acts, 1854 and 1862, the Board of Trade had directed an official inquiry into the collision (describing it), whereby loss of life ensued, and that the written paper annexed was the statement on which the Board had ordered the inquiry. The "statement" was a copy of the notes of some of the depositions taken at the inquest. The justices proceeded with the inquiry, after protest by the master and mate, and stated in open court, that the court found that neither the mate, before the master came up, nor the master afterwards, rendered such assistance to the crew of the coble as was practicable without

1871

Ex parte Ferguson.

danger to their own ship or crew; and ordered their respective certificates to be suspended for three months. On a motion for a certiorari to bring up this order, the above facts were disclosed on affidavits; and it was further shewn that the "coble" was a vessel employed in the herring fishery; it was twenty-four feet long, seven feet beam, ten tons burthen, drawing about eighteen inches; it had about eight feet of deck forward; with a main and mizen mast and a bowsprit to ship and unship, and a jib, mainsail, and mizensail. The masts were easily removeable, and the vessel was fitted with four oars, to be used when occasion required, viz., in harbour or in shoal water, when the rudder, which projected several feet below the keel, had to be removed. Such vessels often went twenty miles out to sea, and were too heavy, when filled with wet nets and fish, to be moved by oars:—

Held, that the coble was a "ship" within the Merchant Shipping Acts, 1854 and 1862 (17 & 18 Vict. c. 104, and 25 & 26 Vict. c. 63); that the proceedings were valid, and that the justices had power to suspend the certificates under ss. 241, 242, 432, and 433 of the Act of 1854, and ss. 23 and 33 of the Act of 1862; that the copy of the depositions was a sufficient statement or report within par. 6 of s. 23; and that the mate before, and the master after he came on deck, were "in charge" within the meaning of s. 33, which, in case of collision between two ships, makes it the duty of the person in charge of each ship to render such assistance as is practicable, without danger to his own ship and crew, to the crew of the other ship, and makes failure to do so a ground for cancelling or suspending his certificate.

Motion for a certiorari to bring up an order of two justices of the borough of Sunderland, made on the 22nd of December, 1870, suspending the certificates, as master mariner, of John Ferguson and Lewis Hutchinson, for three months.

It appeared, from the affidavits filed in support and against the motion, that on the 21st of September, 1870, Ferguson was the master and Hutchinson the mate (with a master's certificate) of the British screw steamer *Thames*, then proceeding from Sunderland to Cherbourg. When about three miles and a half off Saltburn, about 2.30 A.M., the *Thames* came into collision with a fishing coble called the *Rachel*. No damage was done to the *Thames* or to any one on board, but the *Rachel* sank, and the crew of three men were drowned, a boy only being picked up by a brig that passed soon afterwards. The master was below asleep in the cabin, and the mate was in charge of the deck; the master was soon roused and on deck, but no efforts were made by either to save the crew of the coble. On the 15th of November a coroner's inquest was held on the body of the master of the coble, and a verdict of manslaughter returned against Hutchinson, the mate of the *Thames*

1871

EX PARTE FERGUSON.

Mr. Wilcox, an attorney, of Sunderland, was instructed, on behalf of the Board of Trade, to watch the proceedings at the inquest and report the result. He reported the result at once to the Board of Trade, through the receiver of wrecks at Sunderland, forwarding with his report of the result the notes which he had taken of the evidence before the coroner.

On the 8th of December, at the Winter Assizes, a bill for manslaughter against Hutchinson was thrown out by the grand jury, and no evidence being offered on the coroner's inquisition, a verdict of "not guilty" was returned. The Board of Trade, thereupon, directed that an inquiry should be instituted, and on the application of Mr. James O'Dowd, the assistant solicitor to the Board of Trade, two justices of Sunderland fixed that the inquiry should take place on the 20th of December. Before the inquiry the following notice was served on Hutchinson:—

"Customs, Sunderland.—I hereby give you notice that, in pursuance of the provisions of the Merchant Shipping Act, 1854, and the Merchant Shipping Act Amendment Act, 1862, the Board of Trade have directed an official inquiry to be held into the circumstances of a collision between the s.s. *Thames*, of the port of Sunderland, and a fishing coble, the *Rachel*, of Staithes, on the morning of the 21st of September last, off Saltburn, whereby John Dawson, the owner of the said coble, lost his life; and take notice, that the written paper hereto annexed is the document or statement upon which the said Board have been pleased to order said inquiry.—James O'Dowd, Assistant Solicitor for Merchant Shipping, December 19, 1870."

The statement annexed was a copy of the notes of evidence taken by Wilcox, consisting of the depositions of Ferguson, the master, and Hutchinson, the mate, and of Henry Shaft, the engineer of the *Thames*. A similar notice and statement were served on Ferguson. The depositions of other witnesses had also been taken before the coroner, but no other documents were served on Ferguson and Hutchinson.

On the 20th of December the inquiry took place before two justices of Sunderland, assisted by two nautical assessors of the port of Sunderland appointed by the Board of Trade; and after protest on behalf of Ferguson and Hutchinson, the inquiry pro-

ceeded, the chief objection on their behalf being that the coble was not a "ship" within the meaning of the statutes, and that there was (as the fact was) a local marine board at Sunderland which had not refused to act, and that, consequently, the justices had no jurisdiction.

The "coble" was a vessel employed in the herring fishery; it was about twenty-four feet in length, and seven feet beam, of ten tons burden, drawing about eighteen inches, having about eight feet of deck forward. It had a main and mizen mast, and a bowsprit to ship and unship, with jib, mainsail, and mizensail. The masts were easily removeable; and the vessel was also fitted with four oars to be used as occasion required, viz., in moving the vessel in harbour or in shoal water when the rudder, which projected five or six feet below the keel, had to be unshipped. Such vessels frequently go out to sea more than twenty miles from their port, and when loaded with wet nets and fish are much too heavy to be moved by oars.

The justices, after taking time to consider, on the 22nd of December delivered their judgment in open court as follows:— "The Court is of opinion that, although the master could not, and the mate might not, have seen the collision, both master and mate had almost immediate evidence that a collision had taken place, and that men were in the water. It also finds on the evidence that neither the mate, before the master came on deck, nor the master afterwards did render such assistance as was necessary and practicable to save the lives of the men from the danger caused by the collision, which could have been done without any danger to their own ship and crew. The Court, therefore, orders their respective certificates to be, and they are hereby, suspended for the period of three calendar months from this 22nd of December, 1870."

It was with a view to quash this order that the present motion for a certiorari was made.

The following sections of the Merchant Shipping Acts of 1854 and 1862 are the sections under which the proceedings were taken:—

17 & 18 Vict. c. 104, s. 2: "Ship" shall include every description of vessel, used in navigation not propelled by oars.

Part iii. s. 241: If the Board of Trade or any local marine board has reason to

1871

EX PARTE FERGUSON.

believe that any master or mate is, from incompetency or misconduct, unfit to discharge his duties, the Board of Trade may either institute an investigation, or may direct the local marine board at or nearest to the place at which it may be convenient for the parties and witnesses to attend to institute the same, and thereupon such persons as the Board of Trade may appoint for the purpose, or, as the case may be, the local marine board shall, with the assistance of a local stipendiary magistrate (if any), and if there is no such magistrate of a competent legal assistant to be appointed by the Board of Trade, conduct the investigation, and may summon the master or mate to appear, and shall give him full opportunity of making a defence, either in person or otherwise, and shall, for the purpose of such investigation, have all the powers given by the first part of this Act to inspectors appointed by the Board of Trade, and may make such order with respect to the costs of such investigation as they may deem just; and shall, on the conclusion of the investigation, make a report upon the case to the Board of Trade; and in cases where there is no local marine board before which the parties and witnesses can conveniently attend, or where such local marine board is unwilling to institute the investigation, the Board of Trade may direct the same to be instituted before two justices or a stipendiary magistrate; and thereupon such investigation shall be conducted, and the results thereof reported in the same manner and with the same powers in and with which formal investigations into wrecks and casualties are directed to be conducted and the results thereof reported, under the provisions contained in the eighth part of this Act, save only that, if the Board of Trade so directs, the person bringing the charge of incompetency or misconduct to the notice of the Board of Trade shall be deemed to be the party having the conduct of the case.

S. 242: The Board of Trade may suspend or cancel the certificate (whether of competency or service) of any master or mate in the following cases (that is to say), (1.) If, upon any investigation made in pursuance of the last preceding section, he is reported to be incompetent, or to have been guilty of any gross act of misconduct, drunkenness, or tyranny. (2.) If, upon any investigation conducted under the provisions contained in the eighth part of this Act, or upon any investigation made by a naval court constituted as hereinafter mentioned, it is reported that the loss or abandonment of or serious damage to any ship or loss of life has been caused by his wrongful act or default . . . .

Part viii. s. 432: In any of the cases following, that is to say, whenever any ship is lost, abandoned, or materially damaged, on or near the coasts of the United Kingdom; Whenever any ship causes loss or material damage to any other ship on or near such coasts; Whenever by reason of any casualty happening to or on board of any ship on or near such coasts loss of life ensues; Whenever any such loss, abandonment, damage, or casualty happens elsewhere, and any competent witnesses thereof arrive or are found at any place in the United Kingdom; It shall be lawful for the inspecting officer of the coastguard or the principal officer of Customs residing at or near the place where such loss, abandonment, damage, or casualty occurred, if the same occurred on or near the coasts of the United Kingdom, but if elsewhere, at or near the place where such witnesses as aforesaid arrive, or are found or can be conveniently examined, or for any other person appointed for the purpose by the Board of Trade, to make inquiry respecting such loss, abandonment, damage or casualty; and he shall for that purpose have all the powers given by the first part of this Act to inspectors appointed by the said board.

S. 433: If it appears to such officer or person as aforesaid, either upon or without any such preliminary inquiry as aforesaid, that a formal investigation is requisite or expedient, or if the Board of Trade so directs, he shall apply to any two justices or to a stipendiary magistrate to hear the case; and such justices or magistrate shall thereupon proceed to hear and try the same, and shall for that purpose, so far as relates to the summoning of parties, compelling the attendance of witnesses, and the regulation of the proceedings, have the same powers as if the same were a proceeding relating to an offence or cause of complaint upon which they or he have power to make a summary conviction or order, or as near thereto as circumstances permit; and it shall be the duty of such officer or person as aforesaid to superintend the management of the case, and to render such assistance to the said justices or magistrate as is in his power; and, upon the conclusion of the case, the said justices or magistrate shall send a report to the Board of Trade containing a full statement of the case and of their or his opinion thereon, accompanied by such report of or extracts from the evidence, and such observations (if any) as they or he may think fit.

25 & 26 Vict. c. 63, s. 23: The following rules shall be observed with respect to the cancellation and suspension of certificates, that is to say:—(1.) The power of cancelling or suspending the certificate of a master or mate by the 242nd section of the principal Act (17 & 18 Vict. c. 104) conferred on the Board of Trade shall (except in the case provided for by the fourth paragraph of the said section) vest in and be exercised by the local marine board, magistrates, naval court, admiralty court, or other court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade. . . . (3.) Every such board, court, or tribunal, shall, at the conclusion of the case, or as soon afterwards as possible, state in open court the decision to which they may have come with respect to cancelling or suspending certificates, and shall in all cases send a full report upon the case with the evidence to the Board of Trade, and shall also, if they determine to cancel or suspend any certificate, forward such certificate to the Board of Trade with their report. (4.) It shall be lawful for the Board of Trade, if they think the justice of the case requires it, to re-issue and return any certificate which has been cancelled or suspended, or shorten the time for which it is suspended, or grant a new certificate of the same or any lower grade in place of any certificate which has been cancelled or suspended. . . . (6.) No certificate shall be cancelled or suspended under this section unless a copy of the report or a statement of the case upon which the investigation is ordered has been furnished to the owner of the certificate before the commencement of the investigation, nor in the case of investigations conducted by justices or a stipendiary magistrate unless one assessor at least expresses his concurrence in the report.

S. 33: In every case of collision between two ships it shall be the duty of the person in charge of each ship, if and so far as he can do so without danger to his own ship and crew, to render to the other ship, her master, crew, and passengers (if any), such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision. In case he fails so to do, and no reasonable excuse for such failure is shewn, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default; and such failure shall also, if proved upon an investigation held under the third or eighth part of the Principal Act, be deemed an act of misconduct or a default for which his certificate (if any) may be cancelled or suspended.

1871

EX PARTE FERGUSON.

Gainsford Bruce, in support of the motion.

The chief part of the argument is noticed in the judgment of Blackburn, J. On the point as to whether the "coble" was a "ship" within the Acts, he referred to *Everard* v. *Kendall* (1); *The Malvina* (2); *The Bilbao* (3); and in addition to the sections mentioned in the judgment, he referred to the following sections:— By s. 25 of the Act of 1862, and schedule, table C., articles 3 to 7, the lights to be carried by "ships" are prescribed; and in article 9, those to be carried by open fishing boats, and other open boats, thus distinguishing between ships and open fishing boats. By s. 109 of the Act of 1854, it is enacted that so much of part iii. as relates to lists of crews shall apply to all fishing vessels; but, except that enactment, fishing vessels are not brought within the scope of the Act, and, therefore, any casualty happening to such vessels could not be investigated under part viii., s. 432.

[BLACKBURN, J., expressed a strong opinion that a casualty might be said to happen to a ship if it ran down a boat, although no injury was caused to the ship itself or any one on board.]

By s. 13 of the Act of 1862, registered sea-going ships exclusively employed in fishing on the coasts of the United Kingdom shall be subject to the whole of part iii. of the Act of 1854 (except certain sections), therefore the Act of 1854 did not, prior to the Act of 1862, extend to vessels even of that larger class, and, therefore, could not extend to smaller vessels like the *Rachel*. Sections 432–438 in part viii. relate to "ships" only, but ss. 441–447, as to recovery of wreck, relate to "ship or boat;" but s. 448 is again confined to "ships," and in no section till s. 458, and other sections which relate to salvage, are there the words "ship or boat:" which shews that "ship" does not include "boat." Lastly, if the *Rachel* is a "ship," then she was not a "registered sea-going ship" within s. 13 of the Act of 1862.

In addition to the points more particularly noticed in the judgment, he contended: 1. That as there was a marine board at Sunderland, the application ought to have been made to the board under s. 241 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and that the investigation could not take place before

(1) Law Rep. 5 C. P. 428. (2) Lush. 493.
(3) Lush. 149.

justices unless the board had refused to act, which was not the case in the present instance.

[As to this, the answer given by *Cave* contra the Court thought conclusive, that under s. 433 the investigation in the first instance might be before justices.]

2. That by s. 23 of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), par. 6, there was no power to cancel a certificate unless a copy of the report or a statement of the case upon which the investigation is ordered has been furnished to the owner of the certificate before the commencement of the investigation, and that all that was furnished to the master and mate was a copy of notes of part of the evidence given at the coroner's inquest.

[THE COURT intimated that this was sufficient.]

3. That upon the evidence before the justices no offence was shewn to have been committed under s. 242 (of 17 & 18 Vict. c. 104) for which a certificate could be cancelled. The collision was not shewn to have been by the default of the mate, and it could not have been by the default of the master, as he was not on deck at the time.

[*Cave* pointed out that the offence charged and found was the breach of duty in not saving life after the collision, under s. 33 of 25 & 26 Vict. c. 63.]

4. That under s. 33, the duty of saving life was imposed on the person in charge of each ship, and, therefore, the master being below at the time of the collision could not be liable under that section.

[BLACKBURN, J., thought the view the justices had taken was correct, that "in charge" meant not merely at the time of the collision, but at any time when life could have been saved.]

Cave shewed cause in the first instance, on behalf of the Board of Trade. The arguments consisted chiefly in pointing out the different sections of the two Acts, and shewing that the mode of proceeding was in conformity with them, and are fully noticed in the judgment of Blackburn, J.

BLACKBURN, J. I am of opinion that this rule should be discharged on the ground that the justices had jurisdiction in what they have done, and all that was done was perfectly right. The

1871

EX PARTE FERGUSON.

case is involved in a complicated number of sections, but, now that we understand them, the matter seems pretty clear. The original Act of 1854 (17 & 18 Vict. c. 104) provided by the third part for a variety of things; amongst these, there is s. 241, which enacted, that when there was any reason for believing in the unfitness of a master or mate from alleged incompetency or misconduct, the Board of Trade might institute or direct an investigation. By s. 242, "The Board of Trade may suspend or cancel the certificate, whether of competency or service, of any master or mate in the following cases: 1. If, upon any investigation under the last preceding section, he is reported to have been guilty of any gross act of misconduct; 2. If, upon any investigation conducted under the provisions contained in the eighth part of this Act, it is reported that the loss or abandonment of or serious damage to any ship or loss of life has been caused by his wrongful act or default." It appears, therefore, that under this section the Board of Trade may not only suspend or cancel a certificate where the proceedings are under s. 241, but also where the report is made to them by proceedings under the eighth part where they have ordered an investigation. On referring to the eighth part, the first section (s. 432) is: "In any of the cases following: that is to say, whenever any ship is lost or materially damaged on or near the coasts of the United Kingdom; whenever any ship causes loss or material damage to any other ship; whenever, by reason of any casualty happening to, or on board of, any ship on or near such coasts, loss of life ensues," the inspecting officer, or person appointed by the Board of Trade, is to make inquiry; and by s. 433, the Board of Trade may order an investigation by two justices. Then s. 438 says: Such justices may, if they think fit, require a master or mate "whose conduct is called in question, or appears likely to be called in question, in the course of such investigation,"—clearly shewing that it is not necessary that the master or mate should be actually charged; it is quite sufficient that the case is brought before the justices,—"to deliver such certificate to them; and they may hold the certificate until the conclusion of the investigation, and shall then either return the same to such master or mate, or, if their report is such as to enable the Board of Trade to cancel or suspend such certificate under the powers given to such board by

the third part of this Act, shall forward the same to the Board of Trade to be dealt with as such board shall think fit." In part iii. the Board of Trade had the power to cancel the certificate in certain cases under s. 242. In part viii. no power was given to the conductors of the investigation to cancel a certificate; but they were instructed to forward the certificate to the Board of Trade to cancel it under the power given by the third part of the Act. Therefore, as the Act of 1854 stood unaltered, it is clear that the court investigating had no power to cancel; but the Board of Trade, under s. 242, on receiving their report, had the power in certain cases to cancel. But the Act of 1862 (25 & 26 Vict. c. 63), s. 23, enacts, that "the following rules shall be observed with respect to the cancellation and suspension of certificates; that is to say, the power of cancelling or suspending the certificate of a master or mate by the 242nd section of the Principal Act conferred on the Board of Trade shall (except in the case provided for by the fourth paragraph of the said section) vest in, and be exercised by, the local marine board, magistrates, naval court, admiralty court, or other court or tribunal, by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade." So that the power given to the Board of Trade, enabling them alone to cancel under the third or eighth part of the Act, is taken away. That was no oversight, for the legislature, remembering that the Board of Trade should have the opportunity of reconsidering what the Court below had done, gave the power of mitigating their sentence by the 4th subsection: "It shall be lawful for the Board of Trade to reissue and return any certificate which has been cancelled or suspended, or shorten the time for which it is suspended, or grant a new certificate of the same or any lower grade." Thus giving the Board of Trade the full and complete power to remit the sentence, or do as they please.

These being the enactments, we have to apply them to the present case. It appears that this steamship came in contact with a "coble," which we will assume is a ship within the meaning of the Act. These two vessels, to use a neutral term, came into collision. There was a loss of life to those on board the fishing-vessel, and there was, therefore, a case completely within the eighth part of the Act (s. 432)—the case of one "ship causing loss and material damage

1871

EX PARTE FERGUSON.

to another ship," and also a case of loss of life "by reason of a casualty happening to, or on board, any ship;" for, in consequence of the collision, there was a casualty to both vessels. It was a casualty to both, though the crew of the fishing-vessel alone sustained loss of life. There was, therefore, a collision, and a case for investigation under the eighth part of the Act of 1854, and therefore properly sent to the justices under s. 433. Then the power of suspending the certificate would have been in the Board of Trade, had it not in express words been taken away, and declared to vest in the magistrates. It was therefore vested, in the present case, in the two justices, and the only question remaining is, whether that power was correctly exercised by them. This question arises under s. 33 of 25 & 26 Vict. c. 63: "In every case of collision between two ships it shall be the duty of the person in charge of each ship, if he can do so without danger to his own ship and crew, to render to the other ship such assistance as may be practicable and may be necessary in order to save them from any danger caused by the collision: In case he fails so to do, and no reasonable cause for such failure is shewn, the collision shall be deemed to be caused by his wrongful act, neglect, or default; and such failure shall also, if proved upon any investigation held under the third or the eighth part of the principal Act, be deemed to be an act of misconduct or default, for which his certificate (if any) may be cancelled or suspended." What the justices here found as facts are that this sea-going vessel was a "ship"; there was a collision between that ship and another ship, and the master and mate of that other ship were in fault for not rendering assistance to the crew of the fishing-vessel, and saving their lives. Whether they were right, on the facts, in coming to that conclusion we cannot say. If they took too harsh a view of the conduct of the captain and mate, the Board of Trade may reconsider the matter.

But the point which remains is this: It is said on behalf of the master and mate that the fishing coble cannot be a "ship." She is twenty-four feet long; she is not entirely decked over; she has two masts and a rudder which are removeable, and she may be propelled by four oars. She goes out well to sea; and though the oars are used to get her out of harbour, they are merely auxiliary to the use of sails. It is said on behalf of the Board of Trade that

1871

EX PARTE FERGUSON.

that is a "ship." The chief argument against that proposition is by referring to the interpretation clause (s. 2 of 17 & 18 Vict. c. 104), which says, "'ship' shall include every description of vessel used in navigation not propelled by oars." And the argument against the proposition is one which I have heard very frequently, viz., where an Act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so; the definition given of a "ship" is in order that "ship" may have a more extensive meaning. Whether a ship is propelled by oars or not, it is still a ship, unless the words "not propelled by oars" exclude all vessels which are ever propelled by oars. Most small vessels rig out something to propel them, and it would be monstrous to say that they are not ships. What, then, is the meaning of the word "ship" in this Act? It is this, that every vessel that substantially goes to sea is a "ship." I do not mean to say that a little boat going out for a mile or two to sea would be a ship; but where it is its business really and substantially to go to sea, if it is not propelled by oars, it shall be considered a ship for the purpose of this Act. Whenever the vessel does go to sea, whether it be decked or not decked, or whether it goes to sea for the purposes of fishing or anything else, it would be a ship. I take it that this was what the justices thought. The facts stated are, that this vessel, though of small size (of only ten tons burthen, and only twenty-four feet long), yet goes out twenty or thirty miles to sea—does go there almost entirely with sails, does stay out many hours, as the affidavits state, and I think it is probable that it goes out for days and nights. This makes it impossible to say that it is not a sea-going vessel, and consequently a "ship," coming within the Act without the aid of the interpretation clause. I do not go into the clauses (1) which Mr. Cave has so ably put

(1) *Cave*, in support of the proposition that a fishing-vessel is a "ship" within the Acts, referred to several sections of the Act of 1862 (25 & 26 Vict. c. 63), which, by s. 1, is to be read as part of the Act of 1854. By s. 25 (of the Act of 1862) the Regulations contained in Table C. of the schedule as to lights are to be observed, and in Table C., Article 9, are directions as to the lights to be carried by open fishing-boats; and then by s. 27 it is enacted, that all masters of *ships* shall be bound to take notice of the regulations; by s. 28, in case of damage to person or property from the non-observance by any *ship* of any of the regulations, the damage shall be deemed to have been occasioned by the default of the person in charge of the ship; by

1871

EX PARTE FERGUSON.

before us; I prefer to come to the conclusion I have without them. Of course these clauses fortified me, and made me think that my interpretation is correct. Taking this fishing-vessel to be a ship, there was a collision between two ships, and there was a default of the master and mate of one of the ships in not saving the crew of the other. If we come to any other conclusion than that this was a case within the Acts, the monstrous consequence would follow that the master of the ship would be free from all responsibility for not taking up and saving the crew of a fishing-smack, which the legislature could scarcely mean, and which by the interpretation clause they have by no means said.

There were other minor points urged on the motion for the rule on which we did not call upon Mr. Cave to make any observations, because they were disposed of in the course of the argument. We need only now say that the rule should be discharged.

MELLOR, J. I am of the same opinion. It is necessary, in order to decide this case, to go through a multitude of references, some of them very special. I should think it a work of supererogation to go through these sections after my Brother Blackburn's judgment, because I think he has very distinctly shewn their meaning, and has put the construction on them in which I entirely concur. I will only add that I consider it to be the policy of the Act not to narrow, but rather to enlarge, the definition of a ship, and the objects of the Act seem to apply to a vessel of this description quite as much as to vessels of a larger size.

LUSH, J. I am of the same opinion. I have nothing to add to what has been said by my learned Brothers.

Rule discharged.

Attorney for applicants: *John Scott, for Graham & Graham, Sunderland.*

Attorney for Board of Trade: *Solicitor to Customs and Board of Trade.*

---

s. 29, in case of collision, the *ship* by which any of the regulations have been infringed shall be deemed in fault; and, finally, s. 30, for enforcing the regulations, throughout uses the word "ship" only.

THE QUEEN *v.* LITTLECHILD.
THE QUEEN *v.* HESLOP.

1871
Feb. 2.

Joint Information—Separate Conviction—Separate Penalty—Separate Hearing—Discretion of Justices—1 & 2 *Wm.* 4, *c.* 32, *s.* 3.

By 1 & 2 Wm. 4, c. 32, s. 3, if any person whatsoever shall kill or take any game, or use any dog, gun, &c., for the purpose of killing or taking any game on a Sunday . . . such person shall, on conviction, forfeit for every such offence a penalty not exceeding 5*l.*

At petty sessions an information was laid against two defendants charging that they did use a gun and kill two pheasants contrary to the above statute; each claimed to be tried separately in order to call the other as a witness; the justices refused, and heard the charge against both together, and convicted them, and a conviction was drawn up separately against each defendant imposing a penalty of 3*l.*:—

Held, that it was in the discretion of the justices whether they would hear the charge separately or not: that, as the penalty was imposed on every person acting in contravention of the statute, each defendant was separately liable to the whole penalty, and that separate convictions were right.

On appeal to the Essex Quarter Sessions against a conviction whereby George Littlechild was convicted under s. 3 of 1 & 2 Wm. 4, c. 32 (1) for using a gun and killing game, the sessions confirmed the conviction subject to a case.

At the same sessions, on appeal against another conviction of William Heslop for a similar offence, the justices confirmed the conviction also subject to a case.

The appellant in the first appeal was convicted at the petty sessions of Ongar, for that he did on Sunday the 10th of October, 1869, unlawfully use a certain gun, and did then and there kill certain game, to wit, two pheasants, and was adjudged for his offence to forfeit and pay the sum of 3*l.* and costs; and in default to be imprisoned for twenty-one days unless the several sums be sooner paid.

The appellant's second ground of appeal was as follows: "That,

(1) 1 & 2 Wm. 4, c. 32, s. 3: If any person whatsoever shall kill or take any game or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking game on a Sunday or Christmas-day, such person shall on conviction thereof before two justices of the peace forfeit and pay for every such offence such sum of money not exceeding 5*l.* as to the justices shall seem meet.

1871

THE QUEEN v. LITTLECHILD.

if the justices before whom the information was heard did, in fact, convict me and William Heslop of a joint offence, it was illegal to inflict such separate penalties upon each of us as they inflicted; and if the justices did, in fact, convict each of us of a separate offence, then it was illegal for them to do so upon a joint information and a joint hearing after they had been required on my behalf, and had refused, to hear the charge against me separately."

The facts relied on by the appellant under his second ground of appeal were as follows:—On the 13th of October, 1869, an information was laid against George Littlechild and William Heslop, stating that they did, on Sunday the 10th of October, 1869, unlawfully use a certain engine, to wit, a gun, for the purpose of killing game, whereby they, G. Littlechild and W. Heslop, had severally forfeited a sum of money not exceeding 5*l*. In obedience to two summonses, George Littlechild and William Heslop appeared at the petty sessions, and were defended by the same attorney, who, on behalf of both, applied to the justices that the cases might be heard separately, in order that, on the hearing of the charge against George Littlechild, William Heslop might be called to give evidence; but the justices refused to hear the cases separately, and convicted both the defendants.

The two convictions returned to the quarter sessions were verbatim the same, except as to the names of the persons convicted.

On the hearing of the first appeal, it was contended for the appellant that the proceedings at the petty sessions were irregular and invalid, and that the conviction ought to be quashed.

It was contended for the respondent that the proceedings were not objectionable, and the conviction was valid.

The quarter sessions decided in favour of the respondent; and on hearing the case in the first appeal William Heslop was called as a witness on behalf of George Littlechild.

All the facts above stated equally apply to the second appeal.

The question for the opinion of the Court was, whether, by reason of the proceedings at the petty sessions, the court of quarter sessions ought on the appeal to have quashed the convictions.

Atkinson, for the defendants, contended that the convictions were wrong, first, because the information was jointly against the

two defendants, and if the offences were joint offences they could not be separately convicted. He cited *Ex parte Sylvester* (1). Secondly, if the offences were separate offences, each defendant was entitled to a separate hearing before the justices at petty sessions.

Warton, for the prosecution, contended that it was a matter of discretion with the justices whether each defendant should have a separate hearing: *Winsor* v. *Reg.* (2); and also that the penalty for an offence under s. 3 of 1 & 2 Wm. 4, c. 32, was imposed on every person guilty of the offence, and that as every offender was separately liable to a separate penalty, a separate conviction against each was right. He cited *Rex* v. *Clarke* (3); *Rex* v. *Hube*. (4)

MELLOR, J. I am of opinion that upon the facts stated in the case the judgment of the quarter sessions affirming the convictions is right. *Rex* v. *Clarke* (3) governs this case. In the present case the information was jointly against the two offenders; they were separately convicted in separate convictions. It is clear that the penalty is imposed on each person, and it would have been wrong to have convicted them jointly. It never could be intended that one of the offenders should pay the whole aggregate of the two penalties, or go to prison until the other had paid his share. I think that the convictions were quite right.

LUSH, J. It is perfectly clear that two or more persons may commit an offence under s. 3 of 1 & 2 Wm. 4, c. 32. That being so, the information is not wrong for being joint; it charges that George Littlechild and William Heslop did unlawfully use a certain engine, to wit, a gun, for the purpose of killing game; that is clearly an act which may be committed by two persons jointly. They were summoned together, and at the hearing before the justices each claimed to be tried separately. Had they a right to demand a separate trial? There is no case which says they have this right, and the convictions cannot be impeached on this ground. The other objection is, that although the two persons

(1) 9 B. & C. 61.
(2) Law Rep. 1 Q. B. 390.
(3) Cowp. 610, 612.
(4) 5 T. R. 542.

1871

THE QUEEN v. LITTLECHILD.

were jointly charged, they were separately convicted. I think they might be separately convicted, because the penalty incurred is separate. The imprisonment of one person cannot be the imprisonment of the other; instead, however, of there being one conviction convicting them both, and subjecting each to a penalty, there are two separate convictions; but from this no possible injustice or injury can result.

HANNEN, J. I am of the same opinion. The first question is, whether a person is entitled as of right to be tried separately, in order that he may call another person with whom he is jointly charged as a witness. It is the experience of everybody that this is a matter of discretion, and that a person jointly charged with another has no such right as is here claimed. Then the other question is, whether the offence charged is one for which these persons could be convicted separately. The rule is thus laid down and summed up in Paley on Convictions, 5th ed., p. 262: "If either the penalty be imposed by the Act upon each person convicted, even where the offence would in its own nature be single, or if the quality of the offence be such that the guilt of one person may be distinct from that of the others, in either of these cases the penalties are several." This is a case which falls within the first branch. The legislature intended to punish any one engaged in the acts mentioned in s. 3 of 1 & 2 Wm. 4, c. 32, and a separate conviction in each case was proper. *Mayhew* v. *Wardley* (1) was a case in which two persons were together on a highway jointly engaged in the unlawful act of destroying game, they were separately convicted, and it was held that the conviction was proper. In its circumstances that case is like the present, and I am of opinion that these convictions were right, and the order of the quarter sessions ought to be affirmed.

Order of quarter sessions affirmed.

Attorney for prosecution: *W. R. Preston.*
Attorney for defendants: *C. J. Rawlings.*

(1) 14 C. B. (N.S.) 550.

BURKE *v.* LECHMERE AND OTHERS.

1871
Feb. 4.

Railway Company—"*Subscriber*"—*Agreement to subscribe*—"*Shareholder*"—*Companies Clauses Consolidation Act*, 1845 (8 *Vict. c.* 16) *s.* 8.

A Railway Act, after naming certain persons, enacts that they and "all other persons who have already subscribed or shall hereafter subscribe to the undertaking, are by this Act united into a company for the purpose of making and maintaining a railway." The Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16) s. 8, enacts that every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders, shall be deemed a shareholder of the company.

Prior to the passing of the Railway Act, defendants and others signed a document, whereby they agreed on the passing of the Act for the construction of the railway to subscribe for the number of shares of 10*l.* each placed opposite their respective names, defendants' number being fifty. The Act passed in 1865; in 1866 an allotment of shares was made to defendants, but no notice was given to them; and soon afterwards the proceedings of the company were suspended. Defendants' names were placed on the register of shareholders, and in April 1868 the register was resealed, defendants' names being then on it for fifty specific shares; but no notice of this registration was given to defendants. Calls having been soon after made, defendants repudiated all liability as shareholders:—

Held, that under the agreement defendants were "subscribers" to the undertaking within the meaning of the Railway Act, and therefore had been rightly put on the register, and were "shareholders" within s. 8 of the Companies Clauses Consolidation Act, and liable to pay the calls.

THE plaintiff, having obtained judgment against the London, Worcester, and South Wales Railway Company, sued the defendants by a writ issued pursuant to s. 64 of the Common Law Procedure Act, 1854, for a first instalment of 2*l.* due in respect of 100 shares of 10*l.* each in the company, of which the defendants were alleged to be the holders; and also for a call of 2*l.* 10*s.* in respect of the same shares, and for interest.

The defendants pleaded, that the defendants never were indebted to the company; on this issue was joined.

At the trial before Mellor, J., at the Gloucester Summer Assizes, 1870, a verdict was entered by consent for the plaintiff, with leave to move on facts taken as agreed.

Prior to the passing of the London, Worcester, and South

1871

BURKE v. LECHMERE.

Wales Act, 1865 (28 & 29 Vict. c. cclxx.) (1), an agreement of subscription was signed by the defendants and others: "London, Worcester, and South Wales Railway; Stratford-on-Avon to Worcester. We, the undersigned, hereby agree on the passing of the Act for the construction of this railway, to subscribe for the number of shares of 10*l.* each, set opposite to our respective names." The defendants signed under the name of "Berwick & Co., Bankers, Worcester;" and the number of shares placed after their names was fifty.

After the Act was passed in 1865, one Adcock, a share broker of the company, was employed to get subscriptions, and he returned a list to the company in which the names of Berwick & Co. appeared with 100 shares set opposite; but he had no authority to put down the defendants as subscribers for that or any other number of shares. In December, 1865, a subscription contract under the Act was sent to Adcock to be taken to the various subscribers to be signed by them; but it was not taken to the defendants. On the 7th of March, 1866, the company allotted 100 shares to the defendants by resolution of the directors:—"Resolved, that the shares, applied for by the several persons in Worcester and the neighbourhood through Mr. Adcock, specified in the list forwarded by him, be and are hereby allotted to them."

No notice of allotment was received by the defendants.

Soon after the allotment a panic occurred in the money market,

(1) By 28 & 29 Vict. c. cclxx. s. 4, certain persons (naming them) and all other persons who have already subscribed, or shall hereafter subscribe to the undertaking, are by this Act united into a company for the purpose of making and maintaining the London, Worcester, and South Wales Railway, and for all other purposes of this Act, and for those purposes are by this Act incorporated by the name of "The London, Worcester, and South Wales Railway Company," and by that name shall be one body corporate with perpetual succession and a common seal, and with power to purchase, take, hold, and dispose of lands, &c.

By the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16) s. 8, every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereafter mentioned, shall be deemed a shareholder of the company. This section is incorporated with the special Act, by s. 2.

in consequence of which further proceedings with the company's affairs were suspended.

The defendants were placed on the sealed register of shareholders kept pursuant to the Act; and on the 28th of April, 1868, the register was duly re-sealed, the defendants' names being then on the register, in respect of fifty shares, numbered 3901–3950.

No notice of registration was given to the defendants.

In May, 1868, application for 2*l.* per share payable in respect of fifty shares on allotment was made by the company to the defendants. On the 7th of May, 1868, the defendants wrote, saying that they had no note of having made an application for shares in the company, and had no recollection of an allotment having been made to them. On the 17th of July, 1868, the company duly made a call of 2*l.* 10*s.* per share in respect of fifty shares upon the defendants, of which notice was duly given to them.

It was admitted that if the plaintiff could recover he was entitled to interest; the time for payment of the calls having elapsed; and that the verdict was to be for plaintiff for 450*l.* and interest, with leave to enter the verdict for defendants.

A rule having been obtained accordingly,

Feb. 3. *H. James, Q.C.*, and *T. S. Pritchard*, shewed cause. The defendants are shareholders in the company, and liable to pay the calls. They have entered into an agreement to subscribe to the undertaking, and, by s. 4 of the Act, persons who have already subscribed, or shall hereafter subscribe, to the undertaking, are united into a company, and incorporated; then, by s. 8 of the Companies Clauses Act, 1845 (8 Vict. c. 16, which is incorporated with 28 & 29 Vict. c. cclxx. by s. 2), "Every person, who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall have otherwise become entitled to a share in the company, and whose name shall have been entered on the register of shareholders, shall be deemed a shareholder of the company." A subscriber is a person who stipulates that he will contribute a certain amount towards an undertaking: *Thames Tunnel Co.* v. *Sheldon* (1); and the fact that the defendants agreed with others that they would sub-

(1) 6 B. & C. 341, 348.

1871

BURKE v. LECHMERE.

scribe precludes them from withdrawing from the undertaking: *Kidwelly Canal Co.* v. *Raby* (1); the defendants were, therefore, rightly put on the register: *Midland Great Western Ry. Co. (Ireland)* v. *Gordon* (2); *Nixon* v. *Green* (3); and they became shareholders, and are liable to pay the calls. The defendants may, perhaps, rely on *Wolverhampton Waterworks Co.* v. *Hawkesford* (4), but that decision does not affect this question. There the company sued in respect of a subscription contract made with third persons, and there was no privity between the company and the defendant. Neither is *Waterford Ry. Co.* v. *Pidcock* (5) applicable: there the defendant had never signed any contract to become a subscriber, and was, therefore, improperly put on the register of shareholders.

Feb. 4. *J. O. Griffits* and *Bosanquet*, in support of the rule. The case of *Kidwelly Canal Co.* v. *Raby* (1) does not apply. There the defendant, having signed the subscription contract, was put on the register of shareholders, and he was estopped, therefore, from denying that he was a shareholder. Here the defendants have not subscribed, but they agree to become subscribers on a certain event happening; the agreement is conditional, and the condition was never performed, as the company fell to the ground. It is also a conditional agreement with persons not in existence at the time the contract was made. Besides, the conditional agreement was to have been carried out in a reasonable time. It is like an application for an allotment of shares; if the allotment is not made within a reasonable time, the applicant is not bound to take the shares. The agreement is entered into in 1855; the allotment of shares is not made till 1866, and the register is re-sealed in 1868. The agreement was, therefore, not carried out within a reasonable time. There is a difference between subscribing and agreeing to subscribe for shares; here there was only an agreement to subscribe. Adcock had no authority to put down the defendants' names for 100 shares in the subsequent agreement, and it was in pursuance of that agreement that the shares were allotted to the defendants, and their names put on the register. The defendants are, there-

(1) 2 Price, 93.
(2) 16 M. & W. 804.
(3) 3 H. & N. 695; 27 L. J. (Ex.) 509.
(4) 6 C. B. (N. S.) 336; 28 L. J. (C. P.) 242.
(5) 8 Ex. 270; 22 L. J. (Ex.) 140.

fore, not liable, as they never were properly on the register as shareholders, and, moreover, never had any notice of allotment or of the registration.

MELLOR, J. I am of opinion that our judgment must be for the plaintiff so far as fifty shares. The circumstances of the case seem to be as follows:—It was proposed to construct a certain railway, and in order to carry out the undertaking an agreement was entered into as follows: "We, the undersigned, hereby agree, on the passing of the Act for the construction of this railway, to subscribe for the number of shares of 10*l.* each set opposite to our respective names." Amongst the names appended to this agreement was the name of the defendants, and the number of shares opposite to their name was fifty. That is an agreement between the defendants and the other persons who signed it, and no one could withdraw from it, as each subscribed to the agreement on the faith that the others would sign. After this agreement had been entered into, the Act passed, and s. 4 of that Act, after naming certain persons, enacts "that they and all other persons who have already subscribed or shall hereafter subscribe to the undertaking, and their executors, administrators, successors, and assigns respectively, are by this Act united into a company for the purpose of making and maintaining the railway." The question therefore, is: Are the defendants persons "who have already subscribed"? It is said that this is a conditional subscription; but that, I think, is immaterial, because it has become absolute by the passing of the Act and by the incorporation of the company. The defendants had, at the time of the passing of the Act, subscribed to the undertaking, and therefore they, as well as the others who have subscribed, are united into the company. Then it is said that, to make the defendants liable, the directors ought, immediately on the passing of the Act, to have proceeded to allot the shares. This is not necessary. I can find nothing in the Act which requires that shares shall be allotted to any person who has already subscribed for a specific number and amount of shares. It appears, from the facts stated, that the broker of the company, in an unauthorized manner, allotted to the defendants 100 shares. There was, undoubtedly, no authority to place the defendants on the

1871

BURKE v. LECHMERE.

register for 100 shares, which had been allotted, but had never been accepted by the defendants. But I can find nothing in the facts to disturb the state of things which was created by the passing of the Act; and I think, therefore, that the defendants were rightly placed on the register for fifty shares, for which they had subscribed, and to which they were clearly entitled. By s. 8 of 8 Vict. c. 16 "every person, who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company." No mention is made of an allotment of shares; the only thing to be done is to put the subscriber on the register of shareholders. Then s. 9 prescribes the form of the register: "The company shall keep a book to be called the 'register of shareholders,' and in such book shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number and the amount of the subscriptions paid on such shares." Therefore, when the company had put the defendants on the register they became shareholders of the company in respect of the fifty shares of 10*l.* each, and the plaintiff was entitled to maintain this action against them in respect of the amount due on fifty shares.

LUSH, J. I am of the same opinion. Section 4. of the private Act says that certain persons who are named there, "And all other persons who have already subscribed or shall hereafter subscribe to the undertaking, and their executors, administrators, successors, and assigns respectively, are, by this Act, united into a company for the purpose of making and maintaining the railway." The Companies Clauses Act is incorporated with this Act; and s. 8 enacts, "That every person, who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders

hereinafter mentioned, shall be deemed a shareholder of the company." The question is, whether the defendants are persons who had subscribed towards the capital of the company, and whose names had been entered on the register in respect of the number of shares for which they had subscribed. What they did was this: before the scheme obtained the sanction of Parliament, they signed, with a number of other persons, an agreement in these terms: "We, the undersigned, hereby agree, on the passing of the Act for the construction of this railway, to subscribe for the number of shares of 10*l.* each set opposite to our respective names;" and opposite the defendants' names and address was "fifty." Therefore, they signed an agreement that, on the passing of the Act, they would subscribe for fifty shares of 10*l.* each; what is that but a "subscription" to the capital of the company, that is, as defined by Bayley, J., in *Thames Tunnel Company* v. *Sheldon* (1), the putting down their names to a contract, by which they bind themselves to contribute to the extent of the number of shares for which they put down their names? I cannot conceive what else the statute could have meant, or that any particular form of words is needful in order to amount to a subscription within the meaning of the Act. The intention of the legislature is, that those persons who agreed beforehand, in writing, to take a certain number of shares in the capital of the company, and whose names have been entered on the register as the holders of those shares, shall be shareholders of the company. Nothing in either of the Acts makes it requisite that the company, after its incorporation, should give the subscribers any notice that their names have been put on the register. The subscription itself authorizes the directors to enter the names of those who have subscribed on the register for the number of shares which they have agreed to take. That has been done here, and, therefore, the defendants are liable to the calls on the fifty shares.

HANNEN, J. I am of the same opinion. The construction which was contended for on behalf of the defendants gives no effect to the language of s. 4 of the special Act, because it would leave no persons whatever who would come within the description of "per-

(1) 6 B. & C. at p. 348.

1871

BURKE v. LECHMERE.

sons who have already subscribed to the undertaking." No doubt the word "subscribed" is used in two senses. Originally, it meant only those who put their names to an agreement to pay money; but it has come to be used in the more popular sense of those who have paid the money. But the dictum of Bayley, J., which has been referred to by my Brother Lush, puts the true construction upon it in such Acts as the present. As used for these purposes it means those persons who have agreed to contribute towards the undertaking. Now that is exactly what the defendants and the others have done who have signed this document. "We, the undersigned hereby agree, on the passing of the Act, to subscribe for the number of shares set opposite our respective names." Then, if they fall within the description of persons who have already subscribed, does anything remain to be done on the part of the directors? All that took place with reference to Mr. Adcock may be left out of consideration. No doubt what was done by him was done without authority; but the question simply is, Were the directors justified in putting upon the register persons who had subscribed after the lapse of about two years from the time of the passing of the Act? There is nothing to make the time within which the register shall be made up an essential condition to the validity of the register; and I find that the point has been decided in the case of *Wolverhampton Waterworks Co.* v. *Hawkesford* (1), in which the objection was taken that the names ought to have been put upon the register within a shorter time than had been done; but Erle, C.J., in delivering the judgment of the Court, says, "We are of opinion that the time directed is not an essential condition, and that the register may, after that time, be valid." The directors in this case have, in fact, made up the register, and put the defendants' names upon it; and that being done, they have brought the defendants within the description of shareholders given by s. 8 of the Companies Clauses Act.

Rule discharged; the verdict to stand as to fifty shares only.

Attorneys for plaintiff: *Lyne & Holman.*
Attorneys for defendants: *Dyne & Harvey.*

(1) 7 C. B. (N.S.) 795, 815; 29 L. J. (C.P.) 121, 127.

RAWNSLEY, APPELLANT; HUTCHINSON AND OTHERS, RESPONDENTS. 1871 *Feb.* 1.

Appeal—Costs—Taxation of Costs at adjourned Sessions.

The appellant appealed to the quarter sessions held in October against the refusal of a beerhouse certificate. The appeal was dismissed with costs. The sessions were afterwards adjourned to November, and the costs of the appeal were taxed at the adjourned sessions:—

Held, that the costs were rightly taxed at the adjourned sessions.

RULE calling on the respondents to shew cause why an order of sessions, made in an appeal of Rawnsley, appellant, and Hutchinson and others, respondents, whereby the appeal was dismissed, and the appellant ordered to pay the sum of 27*l.* 11*s.* 8*d.* to the respondents by way of costs in the appeal, and also an order of Brett, J., dated 4th of January, 1870, should not be severally quashed for the insufficiency thereof.

At the general annual licensing meeting for the borough of Halifax, held on the 20th of August, 1869, the appellant applied for a certificate to enable him to obtain a licence to sell beer. The justices refused the application. At the adjourned general annual licensing meeting, held on the 17th of September, 1869, the appellant renewed his application, which was again refused. The appellant appealed to the quarter sessions, holden at Leeds, on the 18th of October, against the refusal to rehear his renewed application. The court of quarter sessions dismissed the appeal with costs. The quarter sessions at Leeds, were adjourned to Doncaster, and from Doncaster were adjourned to Sheffield, and at the adjourned sessions, held at Sheffield, in November, the costs of the appeal were taxed, by the clerk of the peace, at 27*l.* 11*s.* 8*d.*

On the 4th of January, 1870, the order on the appellant to pay the sum of 27*l.* 11*s.* 8*d.*, was, by order of Brett, J., removed into this court, pursuant to 12 & 13 Vict. c. 45, s. 18, for the purpose of enforcing it; upon which this rule was obtained.

Philbrick shewed cause. The rule must be discharged. The clerk of the peace properly taxed the costs at the adjourned sessions, which are the same sessions as the original sessions. Of course if the sessions had not been adjourned, and the costs had

1871

RAWNSLEY v. HUTCHINSON.

been taxed at a subsequent quarter sessions, the order would have been bad. But the present case is too clear for argument. In *Reg.* v. *Belton* (1), the costs were taxed in the interval between two quarter sessions, and the appeal was adjourned to a subsequent sessions for the purpose of awarding costs. That was decided to be irregular on the construction of ss. 27 & 29 of 9 Geo. 4, c. 61. And in *Reg.* v. *West Riding* (2), the costs were taxed at subsequent sessions. These cases have no application to the present case.

Hannay, in support of the rule. First, the appeal was not adjourned. The granting of costs is a judicial act: *Reg.* v. *Long* (3); *Freeman* v. *Read* (4). The mere adjournment of the sessions did not operate as an adjournment of the appeal. The order for costs not having been made at the original sessions, the appeal was undetermined and fell to the ground. *Reg.* v. *Cambridge Union* (5) shews that the sessions may adjourn a part-heard appeal unless prohibited by statute. The appeal not having been adjourned, the adjourned sessions could have no jurisdiction over the costs of the appeal. Secondly, if the appeal was adjourned, the sessions had no jurisdiction to adjourn it. By s. 8 of the Wine and Beer-house Act, 1869 (32 & 33 Vict. c. 27), an appeal against the refusal to grant a certificate is regulated by ss. 27 & 29 of 9 Geo. 4, c. 61, and it has been decided, on the construction of those sections, that an appeal, such as this, cannot be adjourned for the purpose of giving costs: *Reg.* v. *Belton*. (1)

[KEATING J. In that case the appeal was adjourned, and the costs were taxed not at adjourned but subsequent sessions].

That appears to be so, but the Court decided the case upon the ground that the whole proceeding connected with the appeal is confined to the *next* quarter sessions. Section 27 being express, "that the Court at *such* sessions shall determine the appeal, and under such costs as they shall think fit."

[LUSH, J. In *Reg.* v. *Ely* (6), the facts were precisely similar to the present case.]

The point was not taken in that case. The only question

(1) 11 Q. B. 379; 17 L. J. (M.C.) 70.
(2) 6 B. & S. 531; 34 L. J. (M.C.) 142.
(3) 1 Q. B. 740.
(4) 9 C. B. (N.S.) 301; 30 L. J. (M.C.) 123.
(5) 1 B. & S. 61; 30 L. J. (M.C.) 137.
(6) 5 E. & B. 489; 25 L. J. (M.C.). 1.

argued and decided was, whether the recognizances were estreated in time. In addition to the language of s. 27 of 9 Geo. 4, c. 61, which received a judicial interpretation in *Reg.* v. *Belton* (1), there is a substantial reason why no adjournment of a licensing appeal should be permitted. The quarter sessions, if they allow the appeal, are empowered to grant a licence to the appellant (s. 21): all licences within the counties of Middlesex and Surrey must be granted within the first ten days of March, to be in force until the 5th of April in the following year: and all licences in every other county must be granted between the 20th of August and 14th of September, to be in force until the 10th of October in the following year (ss. 1–13); it follows that the appellant, by carrying his appeal, as he always may, to the April quarter sessions in the one case, and the October quarter sessions in the other, can always obtain his licence, if entitled to it, without any loss of time. But if the sessions have power to adjourn at all, the power is unlimited, and thus the object of the Act, which, as Lord Denman says, in *Reg.* v. *Belton* (1), was, "that everything should be settled speedily," would be defeated.

KEATING, J. (2). In this case the appeal, which was heard at the quarter sessions held on the 18th of October, was dismissed with costs. The costs, however, were not ascertained at once; but the sessions having been afterwards adjourned, and held by adjournment at Sheffield, at the adjourned sessions the costs of the appeal were taxed. The question is, the appeal having been on the refusal of justices to grant a certificate for a beerhouse licence under 9 Geo. 4, c. 61, can the costs be ascertained at adjourned sessions? It seems to me that this is a plain case, because the question really comes to this: whether an adjournment of the quarter sessions is a continuance of the same sessions, or another and a different quarter sessions. If they are not the same sessions, then the costs could not have been ascertained. Section 27 of 9 Geo. 4, c. 61, provides that the appeal shall be to the next general sessions . . . unless such sessions shall be holden within

(1) 11 Q. B. 379; 17 L. J. (M.C.) 70.

(2) This case was decided in the second division of the Court of Queen's Bench under the Judges Jurisdiction Act, 1870 (33 Vict. c. 6, ss. 2, 4).

1871

RAWNSLEY v. HUTCHINSON.

twelve days after such act shall have been done, and in that case to the next subsequent sessions . . . and not afterwards. Mr. Hannay relies on *Reg.* v. *Belton* (1), but that case does not support his argument, because the appeal was adjourned to a subsequent sessions, and that was held to be too late under that Act of Parliament. In *Reg.* v. *Ely* (2) the facts were very similar, and this very point was involved. It is true the point was not taken, and therefore there was no judicial decision, but the fact of the point not having been taken by counsel or by the Court, seems to shew that they did not attach much weight to the objection; this, at all events, is quite certain, that there is no decision the other way. *Reg.* v. *Belton* (1) is clearly distinguishable. The question, then, really is, is the adjournment of the quarter sessions a continuance of the same sessions? In my opinion they were the same sessions.

LUSH, J. An adjournment of a court is a continuance of the same sitting. This session was continued over to the adjournment day. I can see nothing in s. 27 of 9 Geo. 4, c. 61, which requires an appeal to be determined at the quarter sessions without any adjournment.

HANNEN, J., concurred.

Rule discharged.

Attorneys for appellant: *Bower & Cotton.*
Attorneys for respondents: *Edwards, Layton & Jaques.*

(1) 11 Q. B. 379; 17 L. J. (M.C.) 70.
(2) 5 E. & B. 489; 25 L. J. (M.C.) 1.

[IN THE EXCHEQUER CHAMBER.]

1871
Feb. 3.

BOWRING *v.* SHEPHERD.

Sale of Shares on Stock Exchange—Contract between "Ultimate" Buyer and Seller—Contract by Buyer to indemnify Seller against subsequent Calls.

The defendant, through his brokers, purchased on the Stock Exchange of a jobber 100 shares in a joint-stock company, limited, for 15th of May, 1866. On the name day, 14th of May, the brokers handed a ticket with defendant's name as the buyer to the jobber. This ticket having been, according to the custom of the Stock Exchange, divided, a "split" for fifteen shares came through various hands to the broker of plaintiff, who was the registered holder of fifteen shares, and had, through his broker, sold fifteen shares to another jobber for delivery on the same 15th of May. On the receipt of defendant's name plaintiff executed a transfer of the shares to him, and plaintiff's broker handed the transfer and the certificates of the shares to defendant's brokers, who accepted them on behalf of defendant, and paid plaintiff's broker the price. Defendant's brokers in handing in his name acted by the express authority of defendant, and in accepting the transfer and paying the price they acted according to the custom of the Stock Exchange, though without any express authority of defendant. The company stopped payment on 10th of May, and on 11th of May a petition was presented, and an order of the Court of Chancery for winding up the company was afterwards made. On 18th of May defendant refused to accept the shares, and plaintiff was afterwards compelled to pay a call as the registered holder of the shares; upon which he brought an action against defendant for not indemnifying him against the calls:—

Held, that defendant was bound by the acceptance of the transfer by the brokers on his behalf and payment of the price; and that a contract then arose between plaintiff and defendant, by which defendant was bound to indemnify plaintiff.

Davis v. *Haycock* (Law Rep. 4 Ex. 373) discussed.

ERROR from the judgment of the Court of Queen's Bench in favour of the plaintiff on a special case.

Declaration that before and at the time of the [sale of the shares and of the] delivery of the transfer [thereof] hereinafter mentioned the plaintiff was possessed of fifteen shares in a certain joint-stock company having a capital divided into shares constituted and registered under the provisions of the Companies Act, 1862, by the name of Overend, Gurney, & Co., Limited, of which shares he was the registered owner, and thereupon in consideration that the plaintiff [would sell the said shares to the defendant and] would execute and deliver to the defendant a transfer of the said shares in manner provided by the regulations of the said company, the

1871

BOWRING v. SHEPHERD.

defendant promised the plaintiff to [buy and] accept the [same] *said shares and the transfer thereof from the plaintiff*, and to indemnify and save harmless the plaintiff from all subsequent payments and liabilities for or in respect of the said shares, or for or in respect of any calls which should or might thereafter be made upon or in respect thereof; and although the plaintiff did [sell the shares to the defendant, and did] execute and deliver to the defendant, who then accepted the same, a transfer of the shares pursuant to the before-mentioned agreement, and although the plaintiff has performed all things necessary, and all things and conditions have happened and been performed necessary to entitle the plaintiff to have the defendant indemnify him and hold him harmless against any such payments or liabilities as aforesaid, and although subsequently to the [sale of the shares and the] delivery of the transfer as aforesaid, the plaintiff, as such registered owner as aforesaid, became and was liable to divers calls made subsequently to the [sale and] delivery of the transfer [for and in respect] of the shares [respectively], and was obliged to pay the same, of all which the defendant within a reasonable time in that behalf had notice, and was requested to indemnify and save harmless the plaintiff from the said payments and liabilities, yet the defendant did not nor would indemnify or save harmless the plaintiff from the said payments or any of them, although a reasonable time in that behalf had elapsed before the commencement of this suit. (1)

Pleas (inter alia): 1. That the defendant did not promise as alleged. 4. That the plaintiff did not execute or deliver to the defendant, nor did the defendant accept a transfer of the said shares pursuant to such agreement as alleged. Issue thereon.

At the trial a verdict was taken by consent for the plaintiff for the damages claimed, subject to the following case:—

1. Overend, Gurney, & Co., Limited, was a joint-stock company, constituted under the Companies Act, 1862, by a memorandum and articles of association of the 12th of July, 1865, and incorporated on that day with limited liability; its capital was five millions of pounds, divided into 100,000 shares of 50*l.* each, of

(1) On the argument in the Exchequer Chamber the declaration was amended, by omitting the words within brackets [ ], and inserting the words in italics, "said shares and the transfer thereof from the plaintiff."

which, at the times of the dealings hereinafter mentioned, 15*l.* had been called up, and these shares were transferable under the conditions prescribed by the articles of association.

2. At the time of the several dealings hereinafter mentioned in the shares of the company, the plaintiff was the holder of (among others) fifteen shares in the company, numbered respectively from 74,451 to 74,465 inclusive, and was registered as such holder in the register of members of the company.

3. The company continued to carry on business up to about 3 P.M. of the 10th of May, 1866, when it stopped payment, and during this time the shares in the company were regularly quoted, bought, and sold in the ordinary way.

4. Upon the 13th of April, 1866, Messrs. Cawthorn & Scott, who were stockbrokers and members of the London Stock Exchange, in pursuance of instructions to purchase for the defendant 100 shares in the company at 15*l.* a share previously given to them by the defendant, and as the agents for and on account of the defendant, but without disclosing his name, bought on the London Stock Exchange in the ordinary way of Messrs. Hammon, Pain, & Co., who are dealers or jobbers in shares and members of the Stock Exchange, 100 shares in the company for delivery on the next "account" or day of settlement (being the 26th of April, 1866), at the price of 15*l.* per share.

5. Previously to the 26th of April, 1866, Messrs. Cawthorn & Scott obtained from the defendant authority to "carry over" the shares to the next account, being the 15th of May, 1866. This "carrying over" (which is a well-known operation on the Stock Exchange), is effected as between the broker and his principal in form by a resale for the then account, and a purchase for the next ensuing account, but is in substance a postponement of the taking of the shares until the next ensuing account.

6. Under this authority Messrs. Cawthorn & Scott, on the 26th of April, instead of taking any delivery or transfer of the shares bought by them, paid to Messrs. Hammon, Pain, & Co., the sum of 85*l.*, being the difference between 15*l.* per share, the contract price, and 14*l.* 5*s.* per share, the market price of the shares, on the 26th of April, and thus cancelled the contract with Messrs. Hammon, Pain, & Co., and then entered into two contracts, one for seventy

1871

BOWRING v. SHEPHERD.

and the other for thirty shares in the company at 14*l.* 5*s.* per share, for delivery on the next account on the 15th of May.

7. The effect was the same as if the shares had been originally bought in two lots of seventy and thirty shares respectively under an order for 100 shares for delivery on the account of the 15th of May at the above-mentioned price of 14*l.* 5*s.*, the defendant being debited by Cawthorn & Scott in their account with him with the 85*l.* paid by them.

8. Of these contracts for the "account" of the 15th of May, that for the seventy shares was between Messrs. Cawthorn & Scott as the buyers, and Mr. J. P. Kitchen, a dealer or jobber in shares, and a member of the London Stock Exchange, as the seller; and that for the thirty shares was between Messrs. Cawthorn & Scott, as the buyers, and Messrs. Baker & Co., dealers or jobbers in shares, and members of the London Stock Exchange, as the sellers. Both contracts were made according to the usual course of business of that Stock Exchange. According to the established practice or custom of that Stock Exchange, Messrs. Cawthorn & Scott made the purchases in their own names, and without communicating the names of their principal in the transaction, no particular or specific shares were mentioned or understood to be bought, no particular person was mentioned as the holder or intended transferor of the shares, and the sellers were not bound to deliver or transfer, or be in a position to deliver or transfer the shares so bought until the "account" on the 15th of May. Mr. Kitchen and Messrs. Baker & Co. did not know whether Messrs. Cawthorn & Scott were acting as brokers for an undisclosed principal or for themselves, and Mr. Kitchen and Messrs. Baker & Co. respectively sold on their own account as such dealers or jobbers.

9. Upon the 9th of May, 1866, Mr. Thomas Snelling, who was a stockbroker, and a member of the London Stock Exchange, in pursuance of instructions to that effect previously given to him by the plaintiff, and as the agent for and on account of the plaintiff, sold on the London Stock Exchange in the ordinary way fifteen shares in the company for delivery on the account day on the 15th of May, 1866, at 12*l.* 10*s.* per share. This sale was made by Mr. Snelling, as the seller to Messrs. Bristowe Brothers, who were also members of the London Stock Exchange, and dealers or

jobbers in shares, as the buyers. It was made according to the usual course of business, and in accordance with the established practice or custom of the Stock Exchange in similar cases, as explained in par. 8. Mr. Snelling did not communicate the name of the plaintiff to Messrs. Bristow, and the latter did not know whether Mr. Snelling was acting as broker for an undisclosed principal or for himself, and Messrs. Bristow made the purchase on their own account as such dealers or jobbers.

10. Upon the name-day, being the day before the 15th of May, Messrs. Cawthorn & Scott (who besides the seventy shares before-mentioned had previously to the name-day purchased as brokers of Mr. Kitchen thirty other shares in the company for delivery on the account of the 15th of May), were, according to the rules of the Stock Exchange (1) bound to pass to Mr. Kitchen on account of 100 such shares a ticket containing the name or names of the buyer or buyers (such buyer or buyers being the bonâ fide purchasers) (2), and accordingly, on the 14th of May, they delivered to him a ticket with the name of the defendant as the buyer, in the form usually adopted, having express instructions from the defendant to do so.

11. There is a general practice or custom on the Stock Exchange for the holder of such a ticket to deliver or transfer it to any other member of the Stock Exchange (whether a broker or a dealer or jobber in shares) from whom he may have purchased the like number of shares in the same company, for the same account, and for such person in turn to deliver or transfer it to another such person under the like circumstances, and so for the ticket to pass from hand to hand until it reaches the hands of some broker or dealer, who, or whose principal has sold without having also purchased the shares for that account. The person on whose behalf such broker or dealer has sold, whether he sold on his own behalf or on behalf of a principal, is hereinafter referred to as the "ulti-

(1) A copy of the rules was attached to the case; the material rules are printed in Law Rep. 4 C. P. 53.

(2) It is worthy of remark that the statement of the custom of the Stock Exchange as here given is explicit that the nominee or person whose name is handed in as the ultimate buyer must be the bonâ fide purchaser; going further than the statement in *Maxted* v. *Paine* (Law Rep. 4 Ex. at p. 205), and being in accordance with the judgment of Lush, J., in that case in the Exchequer Chamber (Law Rep. 6 Ex. at pp. 133, 141).

1871

BOWEN v. SHEFFIELD.

mate seller." Moreover, if any person into whose hands the ticket thus comes, has not purchased the whole of such shares from the same person, the practice or custom is for him to divide or split up such ticket among the several persons from whom he has in the aggregate purchased the amount of shares mentioned in it, and for that purpose to make copies (technically called "splits") of such ticket, substituting in each copy the number of shares purchased from the person to whom he delivers it, and adding his own name as the person splitting the ticket; and each of these "splits" is thenceforward delivered or transferred from hand to hand, in like manner as the original ticket, until it reaches the hands of some broker or dealer, who or whose principal has sold without having also purchased the shares for that account, and who or whose principal would therefore, as to the shares included in that "split" be the "ultimate seller." The giver of the ticket, whether a whole or split at the time when he gives it, pays or receives, as the case may be, to or from the person to whom he gives it, the difference, if any, between the price named in it and the price at which the giver of the ticket bought of the person to whom he passes it.

12. The ticket, whether a whole ticket or a split, having reached the broker of the ultimate seller, the practice or custom then is, for him to procure a transfer made direct from the holder of the shares to the person named in the ticket as transferee. The price inserted in the transfer as the consideration is that named in the ticket. This transfer, executed by the transferor, the broker of the ultimate seller delivers to the broker or jobber who issued the ticket, and who is therein named as the person to pay. He, if not himself a principal, delivers it to his principal to be accepted or executed by the transferee. No intermediate transfers are required. The person who issued the ticket pays the sum therein named to the broker of the "ultimate seller," or to the ultimate seller himself if he acted as his own broker, and the ultimate seller receives from his broker the price at which he sold, the differences (if any) having been paid or received by the intermediate brokers or dealers at the time of passing the ticket as before stated. The broker of the "ultimate seller" (by thus delivering the transfer according to the ticket—whether a whole ticket or a "split") is, by the rules of

the said Stock Exchange, deemed to have fulfilled the contract with his immediate buyer and is entitled to payment, and in case of payment being refused by the member issuing the ticket, such buyer must make immediate payment.

13. Also by the rules of the Stock Exchange every person passing a ticket is required to write on the back of the ticket the name of the member to whom it is passed. A member dividing a ticket is to retain the original ticket that access may be had to it should any portion of the shares have been sold out, and the member who has passed on the original ticket is required to trace it in the event of any portion of the shares having been sold out. Shares are said to be sold out when default having been made by a broker in giving the name of a buyer the person who sold sells, as he is entitled to do, in public on the Stock Exchange, by which means a buyer is found, and the broker in default is bound to pay the difference.

14. On the occasion in question Mr. Kitchen, having purchased 100 shares or upwards in the company for the same account of Mr. Woolf, a dealer or jobber and a member of the Stock Exchange, in accordance with the practice or custom, handed him the ticket received from Cawthorn and Scott. Mr. Woolf had purchased in the whole 100 shares or upwards in the same company for the same account from different dealers or jobbers on the London Stock Exchange; and he, therefore, in accordance with the practice or custom, divided or split up the ticket amongst various members of the Stock Exchange, either brokers or jobbers, and among others he made out and delivered to one of such brokers or jobbers and a member of the London Stock Exchange, from whom he had purchased fifteen of the said shares for the said account, a "split," and handed this to such jobber or dealer, and at the same time made out and handed to other persons similar "splits" for the remaining eighty-five shares out of the 100 so bought by him.

15. The above-mentioned "split" for fifteen shares was passed from hand to hand in the manner and according to the practice or custom above-mentioned, until it came into the hands of Messrs. Bristow Brothers, and was by them handed to Mr. Snelling as broker for the plaintiff, the ultimate seller.

16. Accordingly, Mr. Snelling prepared and the plaintiff executed

1871

BOWRING v. SHEPHERD.

a deed of transfer, for transferring the fifteen shares to the defendant, as follows:—"I, Andrew Bowring, of 50, Fenchurch Street, London, Esq., in consideration of 225*l.* paid to me by John Shepherd, of Manchester, merchant, do hereby bargain, sell, assign, and transfer to the said John Shepherd fifteen shares, numbered 74,451 to 74,465 inclusive, of and in the undertaking called the Overend, Gurney, & Co., Limited, to hold unto the said John Shepherd, his executors, administrators, and assigns, subject to the several conditions on which I held the same immediately before the execution hereof; and I, the said John Shepherd, do hereby agree to accept and take the said shares, subject to the conditions aforesaid; as witness our hands and seals this 15th day of May, 1866."

17. The above deed was according to the form which had been always used and adopted for the transfer of shares in the company, and was duly stamped.

18. Upon the 15th of May, Mr. Snelling, as the broker for the plaintiff, in accordance with the practice or custom, delivered to Messrs. Cawthorn & Scott, the brokers of the defendant, as the issuers of the ticket, the transfer, duly executed by the plaintiff, and also the certificates for the fifteen shares, and Messrs. Cawthorn & Scott then received such transfer and certificates, which they placed to defendant's account, and which they forwarded to him for his acceptance, and they paid to Mr. Snelling the sum of 226*l.* 2*s.* 6*d.*, being 225*l.*, the price of the shares at 15*l.* each, which price Messrs. Cawthorn & Scott had inserted in the ticket, as it was the price the defendant was liable to pay them for the shares, as he had not repaid the 85*l.* paid by them on the carrying over as aforesaid, together with 1*l.* 2*s.* 6*d.* for the stamp.

19. Messrs. Cawthorn & Scott, in receiving and forwarding such transfer and certificates, and paying the money, were acting without any special instructions to that effect from the defendant; but they acted according to the usual practice or custom of the Stock Exchange. By the rules of the Stock Exchange they were bound to pay the money, and if they had refused to do so would have been personally liable, and would have run the risk of being expelled from the Stock Exchange.

20. The defendant never executed the transfer, but refused to accept these fifteen shares, as well as eighty-five others subse-

quently forwarded to him in like manner by Messrs. Cawthorn & Scott, and the whole were left on their hands.

21. These fifteen were the only shares out of the 100 ordered by defendant, of which transfers were executed on or before the 15th of May, but transfers of all were executed before the expiration of the ten days mentioned in the next paragraph, and of ten of the 100 the transfers were not executed until after defendant, having become dissatisfied with his brokers, had written them, and they had received, the following letter:—

"18th of May, 1866. To Messrs. Cawthorn & Scott,
"London.

"Gentlemen,—In reply to your letter of yesterday, and telegram of previous day, I have to inform you that I will have nothing to do with the shares which you say you had bought for me."

22. By the rules of the Stock Exchange, registered shares, if not delivered within ten days after the account day, may be bought in against the seller at or after twelve o'clock on the eleventh day after the date of the ticket, and all loss incurred thereby is to be paid by him. Messrs. Cawthorn & Scott insisted that the sellers had these ten days beyond the time stipulated in the contract within which they might procure the transfer and delivery of shares, and within which the buyer was bound to accept the shares; but this was disputed by defendant, and Messrs. Cawthorn & Scott sued defendant for not indemnifying them against the payments made by them in the manner aforesaid upon the shares, and the defendant, before trial, settled the action by payment of the then plaintiffs' claim and costs.

23. On the 10th of May, 1866, Overend, Gurney, & Co., Limited, stopped payment. On the 11th of the same month the company passed a special resolution to wind up voluntarily. On the 22nd of June the Court of Chancery, on a petition presented on the said 11th of May, made an order for continuing such voluntary winding-up under its supervision.

24. The Court of Chancery has, in all cases in which application was made to the Court, refused to sanction transfers of shares in the company made after the 10th of May, or to allow any such transfers to be registered, and no application was made to the

1871

BOWRING v. SHEPHERD.

Court as to the said fifteen shares by either the plaintiff or the defendant.

25. The plaintiff's name being on the register was placed by the liquidators of the company upon the list of contributories.

26. On the 31st of August, 1866, the liquidators of the company made a call upon the contributories, and upon the plaintiff as one of them, of 10*l.* per share, payable on the 15th of September, 1866, with interest, if not paid on that day, at the rate of 5 per cent. per annum from that day until payment.

27. The plaintiff thereupon made repeated applications to the defendant to pay this call, or indemnify him against it, but the defendant wholly refused to do so.

28. The plaintiff upon the 25th day of March, 1867, paid to the liquidators the sum of 150*l.*, being the amount of the call upon the fifteen shares, and the further sum of 3*l.* 18*s.* 5*d.* for interest thereon, and after such payment the plaintiff again applied to the defendant to repay him that amount, which the defendant refused to do, and the present action was thereupon brought.

29. The Court may draw all such inferences of fact as a jury might reasonably draw from the above facts, and are to have all the powers of amendment of a judge at nisi prius.

30. The statement of the rules and practice of the Stock Exchange is made without prejudice to any question, whether or to what extent the same or any part thereof are obligatory on the parties to the present action, neither of whom were ever members of the London Stock Exchange.

The question for the opinion of the Court is whether upon the facts above stated the plaintiff is entitled to recover in this action from the defendant the said sum of 153*l.* 18*s.* 5*d.*, so paid by him as aforesaid, together with any and what interest thereon.

On the argument of the case on the 21st of January, 1870, the case of *Davis* v. *Haycock* (1) was cited, and it was agreed that the Court of Queen's Bench should give judgment, pro formâ, for the plaintiff.

Feb. 2. *Sir J. D. Coleridge, S.G.* (*C. Bowen* with him) for the defendant. The judgment in the Court below proceeded on the

(1) Law Rep. 4 Ex. 373.

case of *Davis* v. *Haycock* (1); but that case is of no authority, the Court being equally divided. There was no contract between the plaintiff and defendant; they were never ad idem, the prices at which they bought and sold were different. To hold that a contract existed between them would be to make a chose in action assignable at law. [He referred to *Grissell* v. *Bristowe* (2); *Coles* v. *Bristowe* (3); *Cruse* v. *Paine* (4); *Maxted* v. *Paine* (5); *Paine* v. *Hutchinson* (6); *Hodkingson* v. *Kelly* (7); *Hawkins* v. *Maltby* (8); *Emmerson's Case* (9).]

Horace Lloyd, Q.C. (*H. T. Atkinson* with him) for the plaintiff. The declaration, as amended, was proved by the facts. The name of the defendant was handed in by his express authority; and as soon as the names of the ultimate buyer and seller are exchanged, and the parties are thus brought together, or at least when the transfer is accepted by the buyer and the money paid, as here, there is a contract between them, such as is stated in the declaration, and was held to be implied from the relation of the parties in *Walker* v. *Bartlett* (10). Section 153 of the Companies Act (25 & 26 Vict. c. 89), which enacts that no transfer or dealing with shares shall take place, after the winding-up of a company, without leave of the Court, does not affect the contract of transfer as between the buyer and seller: *Chapman* v. *Shepherd* (11); *Rudge* v. *Bowman* (12); *Stray* v. *Russell* (13).

Sir J. D. Coleridge, S.G., did not exercise his right of reply.

Cur. adv. vult.

Feb. 3. The following judgments were delivered:—

KELLY, C.B., read the following judgment:—The plaintiff in this case, as the vendor, seeks to recover against the defendant, as the purchaser of fifteen shares in a joint stock com-

(1) Law Rep. 4 Ex. 373.
(2) Law Rep. 4 C. P. 36.
(3) Law Rep. 4 Ch. App. 3.
(4) Law Rep. 4 Ch. App. 441.
(5) Law Rep. 4 Ex. 203.
(6) Law Rep. 3 Ch. App. 388.
(7) Law Rep. 6 Eq. 496.
(8) Law Rep. 4 Ch. App. 200.
(9) Law Rep. 1 Ch. App. 430.
(10) 18 C. B. 845; 25 L. J. (C.P.) 208.
(11) Law Rep. 2 C. P. 228.
(12) Law Rep. 3 Q. B. 689.
(13) 1 E. & E. 888, 916; 28 L. J. (Q.B.) 279; 29 L. J. (Q.B.) 115.

1871

BOWMAN
v.
TAYLOR.

pany, damages for a breach of the implied contract by the defendant to indemnify him against the liability to calls made upon him as the registered owner of the shares since the sale and purchase were completed. The defendant insists that he has entered into no contract whatever with the plaintiff, that there is no privity of contract between them, and that, therefore, the alleged liability to indemnity has not arisen.

The circumstances of the case are these: on the 13th of April, 1866, the defendant through his brokers, Cawthorn & Co., purchased 100 of these shares of a jobber for the settling day, the 20th of April. Before this day arrived, he requested his brokers to carry on the contract to the next settling day, the 15th of May. On the 14th, the brokers, by the authority of the defendant, and with his consent, gave in his name as the purchaser of the shares, by means of a ticket in the form provided for this purpose by the rules of the Stock Exchange, to the brokers of the plaintiff, who was the ultimate seller of a portion of these shares, and the plaintiff thereupon, having accepted the defendant as purchaser, on the 15th of May executed a deed of transfer, in the form required by the Act of Parliament, and duly stamped, by which he transferred the fifteen shares in question to the defendant, and delivered the deed of transfer together with the certificates of the shares to Cawthorn & Co., by whom they were accepted on behalf of the defendant, and who paid to the brokers of the plaintiff the price of the shares, and transmitted the deed of transfer and the certificates of the shares to the defendant. No revocation of any authority by the defendant to Cawthorn & Co., and no repudiation of the contract took place until the 18th of May, when a letter was written by the defendant to Cawthorn & Co., refusing to accept the shares. This entire transaction, and the several intermediate purchases and sales by and between various parties, which took place between the original contract of purchase on the 13th of April and the final settling day, the 15th of May, were effected in strict conformity to the rules and usages of the Stock Exchange; and the question is whether under these circumstances a contract arose between the plaintiff and the defendant, which entitled the plaintiff to recover in this action the damages claimed, by reason of the breach of the implied promise of indemnity.

1871

BOWRING v. SHEPHERD.

I am of opinion that, the rules and usages of the Stock Exchange having been imported into and formed a part of the several contracts and dealings between the several parties to the transaction, and, among others, between the plaintiff and the defendant, the plaintiff is entitled to recover against the defendant the damages thus claimed.

The cases of *Grissell* v. *Bristowe* (1) and *Coles* v. *Bristowe* (2), with several other decisions in courts of equity, establish, and it has now become settled law, that where a contract for the purchase and sale of shares has been entered into between individuals through their respective brokers, or with the intervention, as purchasers or sellers, of jobbers, members of the Stock Exchange, the lawful usages and rules of the Stock Exchange are incorporated into and become part and parcel of all such contracts, and the rights and liabilities of individuals, parties to any such contracts, are determined by the operation upon the contracts of these rules and usages. It is, therefore, the effect of these decisions, as applicable to this case, that the defendant,—upon the contract which he instructed his brokers, Cawthorn & Co., to make, resulting in the giving in of his name on the name-day as the purchaser of these shares, and on the plaintiff accepting the defendant as purchaser, and delivering to him or to his brokers, Cawthorn & Co., the deed of transfer and the certificate of shares, and upon his acceptance, or the acceptance of Cawthorn & Co. on his behalf, of such transfer and shares,—became the purchaser of the shares so transferred, by virtue of a contract thus arising and impliedly made between them. It further results from these decisions, that upon the name of the defendant having been accepted by the plaintiff, and the transfer having been accepted by Cawthorn & Co. on behalf of the defendant, the jobber or other person or persons with whom the plaintiff had contracted for the sale of the shares was discharged; and the contract thus created between an ultimate seller and an ultimate purchaser has been enforced, and specific performance decreed in the Court of Appeal in Ireland, overruling the decision of a vice-chancellor, in the case of *Sheppard* v. *Murphy* (3). And if this contract cannot be enforced in a court of law, inasmuch as

(1) Law Rep. 4 C. P. 36. (2) Law Rep. 4 Ch. App. 3.
(3) Ir. Rep. 2 Eq. 544.

1871

Bowring v. Shepherd.

the brokers and jobbers, parties to the transaction in any of its stages, are discharged, no remedy at law exists in either party against the other for any breach of the contract which may be committed. But I am at a loss to understand how a contract thus held to exist between the ultimate parties to a transaction of this nature—or indeed any lawful contract between any two parties whomsoever—if capable of being enforced in a court of equity by a decree for specific performance or otherwise, is not also, and necessarily, the subject of an action at law. In the judgment of the Court of Exchequer Chamber, delivered by Cockburn, C.J., in the case of *Grissell* v. *Bristowe* (1), he expressly lays it down that an action at law upon such a contract is maintainable; and it has now been so held by the Court of Exchequer, in the case of *Davis* v. *Haycock* (2), by two of the judges, though two other judges dissented from the judgment by reason of the form of declaration. *Street* v. *Morgan* (3) is another decision in the Exchequer to the same effect, though in that case the point now in question was not raised at the bar.

I see no reason, therefore, to doubt that, taking the usage of the Stock Exchange to have been imported into this transaction, and to be binding upon the parties, the plaintiff, as the ultimate seller, having accepted the defendant as the ultimate purchaser, and the defendant, by his agents, Cawthorn & Co., having accepted the transfer from the plaintiff, the contract upon which this action was brought was completed between them, and the plaintiff is entitled to recover upon the breach assigned.

It has been contended for the defendant that the splitting up of the performance of the contract to transfer these shares into a number of parts, and so the introducing of a number of parties, is contrary to the principles of the law, and shews that there is no privity of contract between the parties to this action: but that argument is at once met and answered by the usage of the Stock Exchange admitting of and sanctioning such a subdivision of a contract of this nature. And, indeed, were it otherwise, the vast amount of dealings in the purchase and sale of shares and of stocks upon the Stock Exchange through the medium of brokers

(1) Law Rep. 4 C. P. pp. 36, 40, 50. (2) Law Rep. 4 Ex. 373.
(3) Not reported.

would be at an end; for it would be impossible, upon the numerous contracts which are made for the purchase and sale of property of this description, for either the purchaser to find a seller, or the seller a purchaser, of the exact amount of stock or number of shares required, and at the precise time when the sale or purchase is desired by either party.

It has also been argued that the original contract in this case was for shares in a solvent company, and that the company had become insolvent when the shares were to be delivered and accepted. It might be an answer to this objection that the defendant's contract was for the purchase of the shares to be completed on the 26th of April, and that Overend & Gurneys, the company in question, were then solvent, not having stopped payment until the 10th of May, and that the carrying over of the contract from the 26th of April to the 15th of May was at the instance of the defendant himself; but, apart from the facts of this particular case, authorities have been cited to shew—though, indeed, no authorities are necessary—that one who contracts for the purchase of shares in a company, to be completed on a future day, must take his chance of any change in the solvency or otherwise in the condition of the company, and of its consequences, between the making of the contract and the day agreed upon for its performance.

The substantial effect of all the decisions, as applicable to all these transactions, is, that when the dealings of all the parties are complete, by the giving in of the names of the ultimate buyer and the ultimate seller, and the acceptance by them respectively of the persons so named, the original contractor, the jobber, is discharged, and a contract of sale and purchase arises between the ultimate buyer and the ultimate seller, capable of being enforced both at law and in equity.

With respect to the form of the declaration, I think it was sufficient as originally framed, and also that as amended it is substantially supported by the facts of the case.

WILLES, J. I am of the same opinion. I do not think it necessary to rely on the custom of the Stock Exchange, except so far as this: I agree with the distinction, that it does not

1871

BOWRING v. SHEPHERD.

affect the intrinsic character of the authority given to the agents; but I think it is admissible as evidence upon the question whether Messrs. Cawthorn, who were employed by the defendant, and employed to deal according to the usages of the market in which they were brokers, had authority to do what they did in accepting the transfer. That is the only importance I attach to the usage of the Stock Exchange. It appears to me, on the transfer being accepted, if it were accepted by the defendant, there would be an implication, if that be the proper word, from the transfer itself without words, that the person, who took the shares and would reap the benefit from them if they turned out to be beneficial, should take upon himself the burthen if they turned out to be burthensome. That is the contract alleged in the declaration, which the defendant broke, and the only question left is whether the acceptance of the transfer by Cawthorns was an acceptance by the defendant; that depends upon authority, and the authority is according to the usage of the market, and that involved, as on many other markets besides the Stock Exchange, that the brokers should complete the transaction unless the authority be revoked. In this case it was not revoked, and the brokers did complete the transaction by accepting a transfer, and it imposed upon the defendant the same liability as if he had taken the transfer himself, and then had said, after a time, "I find it is a bad business, and therefore you must take it back."

BRAMWELL, B. I am of the same opinion. I think this case is concluded by the authority of *Grissell* v. *Bristowe* (1), in this court, and *Coles* v. *Bristowe* (2). In both cases it was held that the person, whom, I suppose, one may call the immediate purchaser, was discharged, and the ultimate purchaser was substituted for him. These judgments seem to me to involve that, either upon or because of the discharge of the immediate purchaser, the ultimate purchaser became liable, that one liability was substituted for the other by arrangement amongst the parties; and it seems to me it is not like the assignment of a chose in action, which is only enforceable in a court of equity. The immediate seller does not assign to the ultimate seller the right of action that he

(1) Law Rep. 4 C. P. 36. (2) Law Rep. 4 Ch. App. 3.

had against the immediate purchaser, nor does the immediate purchaser assign any right of action which he had against the immediate seller. I think, therefore, this case is concluded by those two authorities, without adverting to many others which point in the same direction. But I should like to say one word about the principle of the thing: The custom of the Stock Exchange has been relied upon here, but I agree with my Brother Willes, it does not depend upon the Stock Exchange practice. Such a state of things as exists here might have arisen without any such practice, and might have existed in any other business. Let us suppose that A. sells wheat to B. for delivery at a future day. When the time for the delivery of the wheat is about to arrive, B. says, "I should much prefer if you would deliver to C." Then A. says, "I should much prefer if you would take delivery from D.;" whereupon D. sends the necessary documents and transfer of the wheat, which we may suppose is in the warehouse of a third person, to C., who takes the documents and pays for the wheat. Can there be any doubt, if afterwards this third person had brought an action for warehouse rent against D., that D. would have a right of action against C. to indemnify him from the consequences of not having removed the wheat? It is clear that he would, and why? Because it would be perfectly manifest that there was an arrangement between them all, whereby a new contract originated between C. and D., the result of which was that D. was entitled to an indemnity from C. That is really the same case as this Stock Exchange transaction. The only difference is, when the parties enter into the contract originally they contemplate the substitution of other parties for the fulfilment of the contract; that is, when they make a contract for the account,—unless the contract for the account was entered into with respect to shares of which there was very little doing in the market, in which case the probability is the thing would be begun and ended between the original parties, and the jobber would bring the ultimate seller and buyer together. But the true way to look at these contracts, and to understand them, is that when A. purports to buy of B. for the account, what he really does is this—A., in effect, says: "I will on the account day take of you, and pay you for certain shares, or I will find some person who will do it for me." And B., on the other hand, says, "On that day I

1871

BOWRING v. SHEPHERD.

will transfer to you certain shares and receive from you payment for them, or I will find somebody who will do it." That is the true explanation of the Stock Exchange contract. When the time arrives—when the seller finds his substitute, and the buyer finds his substitute, and the two substitutes meet through their brokers—then the obligation is created between them, and I cannot, for my part, see any difficulty in dealing with cases of this description; therefore I entirely concur in the opinion of my learned Brothers.

CHANNELL, B. I also concur in the opinion that has been pronounced by the Lord Chief Baron, and which will be found to be the unanimous judgment of the Court; and under these circumstances, I should not have made any observations had not I wished to refer to the case of *Davis* v. *Haycock* (1), in order to explain the grounds upon which I concur in the present judgment, and to remove an apparent inconsistency, perhaps a real inconsistency, between the judgment to which I was then a party, and that which I concur in as pronounced in this case. My Brother Cleasby and I differed from the Lord Chief Baron and my Brother Pigott in that case; but our judgment proceeded entirely on the ground that the contract as there laid was not proved; and I certainly intended to guard myself, and I believe we did guard ourselves, against its being supposed that no action could be maintained. In the present case I am satisfied that the acceptance by the brokers of the defendant of the transfer, must be considered the acceptance of the defendant himself, and that he is to be placed in the same situation as if he had personally accepted that transfer; and then I think, upon the argument of Mr. Lloyd, who has convinced me, that whatever might have been the want of privity in the original transaction, when the defendant, if you like, through the instrumentality of the brokers, came into contact with the present plaintiff, then there was a privity of contract between them sufficient to establish the present right of action. But what I want to observe is, that that point was not made, according to my recollection, at all in the Court of Exchequer. If it were made, it did not receive from me the consideration that it deserved, and I have

(1) Law Rep. 4 Ex. 373.

no recollection of its being made at all. The declaration in the present case has been amended, and therefore is not in terms the same declaration as in *Davis* v. *Haycock* (1). But I do not stop to inquire whether the words that have been struck out have made a substantial alteration in the declaration or not, because the ground on which I give judgment is, that I am satisfied from Mr. Lloyd's argument, that the parties have been here so brought together as to constitute a contract with sufficient privity between the plaintiff and the defendant from the time the shares were accepted by the defendant's brokers. I have stated that I think the point was not made in the Exchequer. Whether it could have been made upon the declaration as there framed I do not know, but the grounds upon which I concur in the judgment of the Lord Chief Baron and the rest of the Court, I have endeavoured to explain, and a new light has been opened to my mind by the argument of Mr. Lloyd, who has raised a point, which, if it was raised in the Court of Exchequer, was not sufficiently considered by myself.

MONTAGUE SMITH, J. I am of the same opinion. I think the defendant made the brokers his agents to make and complete the bargain according to the rules of the Stock Exchange, and that being so, the acts of the brokers, as the agents of the defendant, became his acts, and when the brokers make a contract with the ultimate seller, through the intervention of other brokers, that contract which the brokers so make they make as the agents of the defendant, and it seems to me the defendant is bound by it. The rules of the Stock Exchange are merely machinery for bringing the two parties together. The defendant, by the employment of the brokers, puts that machinery in motion for his benefit, and he is not to take the benefit of that machinery when it may be in his favour, and to cast himself loose from the obligation when he thinks it is a losing contract that he has entered into. I think the acceptance of the transfer by the brokers is the acceptance of it by the principal; and that was distinctly laid down by the Lord Justice of Appeal in Ireland, in the case of *Sheppard* v. *Murphy* (2), where he says: "I agree with the counsel for the petitioner that their [that is, the brokers'] acceptance of the deeds of transfer

(1) Law Rep. 4 Ex. 373. (2) Ir. Rep. 2 Eq. at p. 569.

1871

BOWRING v. SHEPHERD.

was as binding upon the respondent as if he had been present, and had taken them with his own hands." I think, therefore, the judgment ought to be affirmed.

BRETT, J. I am of the same opinion. I think when the defendant authorized the brokers to buy, he authorized them to make a contract of purchase and sale with the first jobber, and gave them authority to hand his name on for the purpose of binding him to that contract with the person who might ultimately accept his name; and I think he further gave the brokers authority to delegate to anybody who should deal with them upon the Stock Exchange before the name-day, the authority to hand on the name in a similar manner, so that when the last person hands the name of the defendant to the plaintiff's broker, and that name is accepted by the plaintiff's broker, there is a contract between the plaintiff and the defendant, which contract binds the defendant at least to accept the transfer. It seems to me unnecessary to consider whether at that date the contract of indemnity is raised, because, if the company is then solvent, if he does not accept the transfer, the shares will be sold out against him; but if the company is insolvent, and the only contract is that he shall accept the transfer, and he broke that contract, the damages would be the same as if the contract of indemnity were then raised. But I think it clear, when the defendant's name is not only given but the defendant's broker has accepted the transfer, that then the contract of indemnity arises; because then the plaintiff has done all that he can do on his part, and the defendant has it entirely in his power not only to accept the transfer from his broker but to accept the shares, and if, having the matter entirely in his power, he chooses not to accept the shares, it raises a duty on his part to indemnify the plaintiff against the consequences of not having done what he was bound to do.

CLEASBY, B. I also think, upon the declaration as it now stands, and the facts as stated, the plaintiff has a good cause of action. I do not want to say anything more with reference to the case on the declaration as it stood originally, which would have

made the case the same as *Davis* v. *Haycock* (1), than this, that no argument has been produced—indeed, Mr. Lloyd did not attempt to argue that question—to satisfy me that there is in reality a contract of sale between the ultimate nominee and the principal seller. I cannot help thinking that the contract in the first instance is between the jobber, who is in reality the share merchant, and the purchaser, or seller, as the case may be, and that all that takes place afterwards is merely the machinery for the purpose of carrying that contract into effect, and I think the illustration of my Brother Bramwell is an extremely good one, and is serviceable with that view. Suppose A. were to agree to sell to B. say fifty tons of bricks at 5*l.* per ton, and he has bought smaller quantities of bricks at 4*l.* a ton of small dealers, and for the purpose of completing the contract and selling the fifty tons of bricks, he tells B., to whom he has sold them, to go to the various persons of whom he has bought them, to obtain from them in lots the quantities of bricks they have agreed to sell, amounting in the whole to the fifty tons. B. goes to each of them, and he pays them, and probably it is put in the form of an invoice, because it is in reality carrying into effect the sale, though not with the original purchaser. But I should not consider in that case myself that there was a contract to sell between B., who bought the fifty tons of bricks, and every one of those persons to whom he went to get the bricks at a totally different price from that at which he had originally bought. That seems to me to be the case here; the machinery employed it is almost necessary to introduce into these matters, because a man cannot go through the expense of having transferred into his own name everything that he deals with, and therefore this mode is resorted to for avoiding that expense, and having the settling done by a sort of ultimate transfer, instead of its going through all the intermediate transfers that would be requisite.

I also wish to make one remark upon the effect of the decision in *Cruse* v. *Paine* (2), referred to in the judgment in *Davis* v. *Haycock* (3). In *Cruse* v. *Paine* (2), the contract was peculiar, but I do not think that makes any difference. The plaintiff agreed with a jobber to sell 100 shares in the company; a name was

(1) Law Rep. 4 Ex. 373. (2) Law Rep. 6 Eq. 641.
(3) Law Rep. 4 Ex. at p. 382.

1871

BOWRING v. SHEPHERD.

handed in, the plaintiff adopted the name and made the transfer in the usual way, and sent it to the nominee whose name had been sent in. The transfer was not registered, and the question arose, was the original jobber still liable? It was argued that there was, by virtue of what had taken place, and by the usages of the Stock Exchange, a substituted contract in the place of the original contract. The case came before Giffard, V.C., in the first instance, and afterwards before the Lord Chancellor, who affirmed the judgment (1); the Vice-Chancellor says (2): "Jobbers are simply principals, and act as principals, and jobbers are personally liable upon the contracts into which they enter. There is no question whatever about that. I consider that to be perfectly clear." And then, after noticing the argument that had been made use of, and the defence that there was in this case a novation which has been set up, he says, "There is nothing like a novation alleged; nothing like a novation ever took place." I refer to that, not for the purpose of confirming the view that was taken before, but merely for the purpose of shewing that the effect given in *Davis* v. *Haycock* (3) to the judgment in *Cruse* v. *Paine* (4) is not altogether incorrect, because if there had been a substituted contract, of course there would have been a contract not only with the original jobber, but also with the nominee; but, as the Vice-Chancellor holds, there is no substituted contract at all, it seems to follow the only contract of sale is the contract with the original jobber. That being so, what is the question in this case? I take it to be this: On the transfer of shares from one man to another, and the acceptance by that other of the transfer, is there or not an implied contract to carry into effect the objects for which this transfer took place? It is a separate transaction, but one arising in the course of carrying into effect the other contract, and it is a transaction between two different parties. Now, for the sake of clearing the ground, let us suppose brokers to be out of the case altogether, and the two principals to the transaction to meet, they are carrying into effect, as in this case, a contract already entered into. The seller says, "I do not transfer

(1) Law Rep. 4 Ch. App. 441.

(2) Law Rep. 6 Eq. at pp. 649, 652.

(3) Law Rep. 4 Ex. at p. 382.

(4) Law Rep. 6 Eq. 641; 4 Ch. App. 441.

these shares, but So-and-so will give you a transfer, and, according to the usage, the contract I have made will be carried into effect." Well, the defendant, the buyer, and the plaintiff, the person who is named by the seller, meet, and the plaintiff hands over a transfer executed by him to the defendant, to be executed by the defendant, and the defendant accepts and receives from him the transfer for the purpose of executing it, and in order that by doing so he may enable himself to be placed upon the register as the holder of the shares; of course, his name will be substituted for that of the original man. Now, is there such an implied contract or not? I take it that there is, because both parties meet together, and you have, therefore (provided the offer and acceptance of the transfer is an agreement at all), a complete privity established. Well, they meet together—for what purpose? The plaintiff has parted with all his beneficial interest in the shares, and he does not want, of course, to have cast upon him the burthen of being upon the register and being liable in that character—that is his object. The object of the defendant is, that having paid for the shares, or having contracted to pay for them, he may obtain the fruits of his bargain by having the means of placing himself upon the register, and so being entitled to the profits of the concern. That being so, is there not, as soon as the transfer is handed to the defendant and accepted by him, an implied contract that he will do that which it is intended shall be done for the purpose of carrying the object of both into effect? My Brother Willes seemed to think the contract was express under circumstances like these. It really appears to me that this is only, for it can only be, an implied contract when it is for the purpose of carrying into effect that which is not particularly expressed. That being so, when the parties meet, and a transaction of this nature takes place, I cannot help thinking it is not a transaction of bargain and sale, because they are not agreed on the price, and it is merely to form the means of carrying the original contract into effect.

As to the exact facts as they stand, the other members of the Court have dealt with them, and there is no doubt that the authority existed in Messrs. Cawthorn to carry the contract into effect in the usual way. It is equally certain that the authority was

1871

BOWRING v. SHEPHERD.

never withdrawn; and it is equally certain Messrs. Cawthorn accepted the transfer. The only question upon which there might be a doubt is, did Messrs. Cawthorn accept the transfer as the agents of the defendant; or did they, as being brokers, having a sort of interest in the matter themselves, leave, as a matter to be dealt with by them and the defendant, the acceptance of the transfer by the defendant himself? Some question might arise upon that; but I think the proper conclusion is, that as they were to carry the thing into effect for the defendant, what they did in accepting the transfer was as agents. That being so, the case is in principle the same as the one I have put, and I think the plaintiff is entitled to the judgment of the Court.

Judgment affirmed. (1)

Attorneys for plaintiff: *Hudson, Matthews, & Co.*
Attorneys for defendant: *Hughes, Masterman, & Hughes.*

Jan. 23.

WADSWORTH *v.* SMITH.

Submission to Arbitration—Clause in Building Contract as to Certificate of Architects—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 17—*Words purporting that the Submission shall not be made a Rule of Court.*

By a written agreement plaintiff agreed to build four houses on land of defendant, defendant to grant plaintiff a lease when the houses were completed; the architects for the time being of defendant were to certify as to the progress of the work, and if there should be any unnecessary delay or unsatisfactory conduct on the part of plaintiff with regard to the erection of the buildings, or any matter or thing connected therewith ("the fact of such delay or unsatisfactory conduct to be ascertained and decided in writing by the architects, against whose decision there shall be no appeal"), then it should be lawful for defendant to employ other persons to execute the works, and to sell the buildings and lease the land to other persons. On an application to make the agreement a rule of court under s. 17 of the Common Law Procedure Act, 1854:—

Held (by Cockburn, C.J., Blackburn and Mellor, JJ.), that, assuming the agreement to be "an agreement or submission to arbitration" within the section, the clause that there was to be no appeal against the decision of the architects

(1) See *Maxted* v. *Paine*, Law Rep. 6 Ex. 132.

amounted to "words purporting that the parties intended that it should not be made a rule of court."

Semble, by the same judges, that the agreement was not a submission to arbitration.

Held, by Hannen, J., that it was not.

MOTION for a rule calling on defendant to shew cause why he should not deliver to plaintiff an original agreement of the 1st of April, 1870, for the purpose of making it a rule of court under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 17, as a submission to arbitration (1).

The following are the material parts of the agreement:—

Memorandum of agreement made 1st of April, 1870, between C. J. Smith (the defendant), and W. Wadsworth, builder (the plaintiff), witnesseth, that Smith agrees to lease and Wadsworth agrees to take two pieces of land (describing them) on the terms hereinafter expressed; and all the tenant's obligations hereinafter mentioned shall be observed by Wadsworth, his executors and assigns, and all the landlord's obligations by Smith, his heirs and assigns. 2. The term shall be 800 years from 1st of August next; rent 60*l.* per annum. 3, 4. The tenant shall forthwith build four houses on the land, according to plans; each house to be of the value of 400*l.* 6. The landlord will at any time execute a lease provided there be then buildings erected in accordance with the conditions, of value of 1600*l.*, and the tenant shall have repaid all sums advanced by the landlord. (A.) Wadsworth shall forthwith commence to erect upon the land the four houses, and Smith will from time to time lend him money in the proportion of 75 per cent. upon the value of buildings erected. (B.) Wadsworth may enter upon the land for the purpose of erecting the houses, but shall not be considered in actual possession except as agent of Smith. C.—Messrs. Scargill & Clarke, or some architect or valuer to be appointed from time to time by Smith, shall inspect the buildings from time to time at the request of Wadsworth, and give a certi-

(1) 17 & 18 Vict. c. 125, s. 17: "Every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court." . . .

1871

WADSWORTH v. SMITH.

ficate of the progress and value thereof, and Smith shall not be called upon to advance any money without such certificate, and the certificate not to be given unless the work is in accordance with the terms of lease. (D.) Wadsworth to repay all advances on or before 1st of August next. (E.) If Wadsworth shall become bankrupt, or execute any deed or instrument for the benefit of his creditors generally, or if there shall be any unreasonable delay or unsatisfactory conduct on the part of Wadsworth with regard to the erection of such buildings, or with regard to any work, matter, or thing, connected therewith (the fact of such delay or unsatisfactory conduct to be ascertained and decided in writing by Messrs. Scargill & Clarke, or other the architect or valuer for the time being, acting under clause C, against whose decisions there shall be no appeal), then it shall be lawful for Smith to purchase materials and employ persons to execute all or any of the works as to which there shall be such delay or unsatisfactory conduct, and the money so expended to be treated as advances under clause A. F. (*inter alia.*) If there shall be such delay or unsatisfactory conduct as mentioned in the last clause, Smith may sell the buildings and lease the land to any other persons.

The plaintiff had brought an action against the defendant for breaches of the above agreement; the second count alleged that although plaintiff partly erected the buildings, yet defendant prevented plaintiff from entering, and compelled plaintiff and his servants to quit the land.

The defendant pleaded to the second count, that prior to the alleged breach there was unreasonable delay and unsatisfactory conduct on the part of plaintiff with regard to the erection of the houses within the meaning of the agreement; and the fact of such unnecessary delay and unsatisfactory conduct had been ascertained and decided in writing by Messrs. Scargill & Clarke, being defendant's architects for the time being, and then acting within the intent and meaning of the agreement, wherefore defendant exercised his right under clause E, and employed persons to execute the works, and discharged plaintiff from continuing the said works, which is the alleged breach.

The plaintiff, in an affidavit in support of the motion, also deposed that no dissatisfaction had been expressed by defendant

1871

WADSWORTH v. SMITH.

or his architects before the 16th of August last, when he took forcible possession of the buildings and land; that the architects never called plaintiff before them, nor had plaintiff ever heard of the certificate until the 16th of January last (the date on which pleas were delivered).

A similar summons had been dismissed by Bramwell, B., without prejudice to an application to the Court.

Ryalls, in support of the motion. The object of this motion is no doubt to give the Court jurisdiction over the certificate of the architects. The clauses in the agreement as to the decision of the architects make it a submission to arbitration within s. 17 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). *M'Intosh* v. *Great Western Ry. Co.* (1) shews that the person in the position of the architects here is to all intents an arbitrator.

[BLACKBURN, J. Collusion was alleged between the engineer and the defendants there, and relief would have been granted whether the reference to the engineer was a submission to arbitration or not. But there is a second difficulty in the plaintiff's way in the present case. There is to be no appeal against the decision of the architect. Does not that amount to saying that the agreement is not to be made a rule of court?]

No: that does not exclude coming to the Court in the present form.

[HANNEN, J., referred to *Scott* v. *Corporation of Liverpool* (2), where an employer had power to put an end to the contract if the contractor should not, according to the determination of the employer's engineer, exercise such due diligence as would enable the works to be completed within the stipulated time. And the contractor was to be paid such sum for the work done as the engineer should determine. And Lord Chelmsford, C., said: "Where the contract provides for the determination of the claims and liabilities of the contractors by the judgment of some particular person, this would be incorrectly called a provision for submission to arbitration, as no dispute can exist in such a case, everything being dependent upon the decision of the individual named, and till he has

(1) 2 De G. & S. 758; 18 L. J. (Ch.) 94; 2 Mac. & G. 74; 19 L. J. (Ch.) 374.
(2) 3 De G. & J. 334, 368; 28 L. J. (Ch.) 230, 238.

1871

WADSWORTH v. SMITH.

spoken no rights can arise which can be enforced either at law or equity."]

In that case the question was, whether the jurisdiction of the court was ousted by the reference to the engineers, but it did not follow that his determination would not be an award. Moreover here the architects would be bound to hear both sides, in order to ascertain the merits of the case, and consequently the inquiry would be in the nature of a judicial proceeding, and therefore an arbitration, and subject to the ordinary rules of such proceedings: *Re Brook* (1).

COCKBURN, C.J. I think this application must be refused. The only question we have now to decide is, whether this agreement is within s. 17 of the Common Law Procedure Act, 1854. If persons will make agreements which put them in the power of others, and operate harshly against them, it is their own fault, and they cannot expect to obtain any assistance from the Court; and I wish to express no opinion as to whether the architects were or were not justified in certifying against the plaintiff in the manner it is alleged that they did. I am of opinion that in s. 17, by "an agreement or submission to arbitration by consent" is meant an agreement by which it is intended by the parties that the matter shall be submitted to a judicial inquiry before a person chosen between them, instead of being left to the ordinary proceedings of a court of law, and not merely left to the uncontrolled and off-hand decision of some architect or surveyor to be appointed by one of the parties only. Here the clause in question gives the defendant power to put an end to the agreement if there is unreasonable delay or unsatisfactory conduct on the part of the plaintiff—such delay or unsatisfactory conduct to be ascertained and decided in writing by Messrs. Scargill & Clarke, the defendant's architects for the time being, against whose decision there shall be no appeal. I am by no means disposed to say that this amounts to a submission to arbitration, although it is certainly wider and different from many of the ordinary clauses as to the certificate of architects which have occurred in cases under building contracts, and which have been determined to be binding on the builder, and not to be clauses of arbitration. The present clause is certainly more like a submission

(1) 16 C. B. (N.S.) 403; 33 L. J. (C.P.) 246. 10 Jur. N.S. 704.

to arbitration; it is on the confines of the two classes; but on the whole it seems to me to savour more of a mere architect's certificate than of a judicial proceeding. Moreover, even if this were a submission within s. 17, I think it could not be made a rule of court, because it is clear that the parties intended that the matter should be left to the decision of the architects without appeal; but to make it a rule of court would be to submit the decision to the jurisdiction of this Court.

BLACKBURN, J. I am of the same opinion. Where by an agreement the right of one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination an award; but where there is an agreement that any dispute about a particular thing shall be inquired of and determined by a person named, that may amount to a submission to arbitration, and the determination, though in the form of a certificate, be an award. Whether there has been what amounts to a valid decision or not by the architects, we cannot now inquire, but that question will be open to the plaintiff at nisi prius. But assuming there has been a decision, to make the agreement a rule of court would be to subject that decision to appeal, contrary to the very terms of the agreement, which says that there shall be no appeal; and s. 17 says, that an agreement of arbitration shall not be made a rule of court if it contain words purporting that the parties intend that it shall not be made a rule of court. We, therefore, cannot make this agreement a rule of court, whether it be an agreement or submission to arbitration or not, because if it be, it contains words purporting that the parties intend that it shall not be made a rule of court.

MELLOR, J., concurred.

HANNEN, J. I am of the same opinion. I think this is not an agreement or submission to arbitration; the clause in question seems to me no more than an extension of the ordinary clause in building contracts, that the certificate of the architect shall be conclusive as to work done and the mode of doing it.

Rule refused.

Attorney for plaintiff: *J. W. Hickin; for Ryalls & Son, Sheffield.*

1871
Jan. 11.

MOSELEY AND WIFE, Administratrix, &c. *v.* RENDELL.

Action—Parties—Administrator de bonis non, when to sue on Contracts made with Administrator after Intestate's Death—Amendment.

Post 346 — 351

A., a coach-builder, was employed up to his death by the defendant, a jobmaster; A.'s widow took out administration, and during two or three months, until her own death, did substantial repairs to carriages of the defendant on the intestate's premises and with his tools, all the materials employed being the intestate's, except one shaft. On the widow's death A.'s daughter took out administration de bonis non to A.'s estate; and sued the defendant for the price of the work done by the administratrix:—

Held, that the proper inference was that the first administratrix had carried on the business for the benefit of the estate, that the money recovered would therefore be part of A.'s assets, and consequently the action was rightly brought by the administratrix de bonis non.

The plaintiff having declared as administratrix of A., and alleged the work, materials, &c., to have been done and supplied to the defendant by her as such administratrix:—

Held, that the declaration might and ought to be amended by stating the plaintiff to be administratrix de bonis non, and the work, &c., to have been done by the first administratrix.

Declaration by L. C. Moseley, and Agnes his wife, administratrix of George Hepburn, deceased, for money payable for goods sold and delivered, work done, and materials provided for the defendant by the deceased, and by the plaintiff Agnes as such administratrix.

Pleas: 1, never indebted; 2, except as to 47*l.* 16*s.* payment before action; 3, payment of 47*l.* 16*s.* after action; 4, that the plaintiff Agnes was not administratrix as alleged.

Replication, confessing the third plea, and joining issue on the others.

At the trial before Hannen, J., at the sittings in Middlesex, during Easter Term, 1870, it appeared that the defendant was a jobmaster, and had employed George Hepburn, who was a coach-builder, for some time up to his death on the 27th of September, 1869, and there was then due from the defendant to the deceased 47*l.* 16*s.*, which had been paid since action brought.

The widow of Hepburn took out administration on the 21st of October, and between the death of the intestate and her own death, in the December following, she carried on the business on

the same premises; and work to the amount of 18*l.* was done by her for the defendant, the work consisting chiefly of substantial repairs to carriages of the defendant, the work being done with the intestate's tools, and all the materials having belonged to the intestate, with the exception of one shaft.

After the death of Mrs. Hepburn the plaintiff Agnes took out administration de bonis non of George Hepburn, on the 14th of January, 1870.

On these facts it was objected that the cause of action was personal to the widow, and had passed to her representatives, and not to the representative of the original intestate. The learned judge was of a contrary opinion, and said he should direct a verdict for the plaintiffs. It was then objected that the declaration was not supported by the facts, and counsel for the plaintiffs then applied to amend the declaration by stating that the plaintiff Agnes was administratrix de bonis non, and that the goods and work were supplied and done by the widow as administratrix. The learned judge refused to amend, on the ground that an amendment had already been made at chambers by adding the husband, and that if the proposed amendment had been then made the defendant might have paid money into court. A verdict was entered for the plaintiffs for 18*l.*, with leave to move to enter a verdict for the defendant.

A rule was accordingly obtained, on the ground that the declaration did not meet the facts, and that the causes of action were part of the estate of Mrs. Hepburn, and did not pass to the administratrix de bonis non of the original intestate.

Edwyn Jones shewed cause. The action was rightly brought by the administratrix de bonis non of the original intestate. The widow, the first administratrix, was clearly carrying on the business for the benefit of the estate, and not for her personal benefit, consequently the money, when recovered, would be assets of the intestate; and therefore she, had she survived, and his personal representative at her death, is the proper person to sue. It has long been settled that when the money recovered would be assets of the deceased's estate, the executor or administrator may sue in his representative capacity, although the promise be made to

1871

MOSELEY v. RENDELL.

him after the testator's death: *Cowell* v. *Watts* (1); *Ord* v. *Fenwick* (2); *Webster* v. *Spencer* (3); *King* v. *Thom* (4); *Partridge* v. *Court* (5). This case is precisely similar to *Aspinall* v. *Wake* (6), where the plaintiffs, as executors, carried on the business of the testator, and drew bills as executors, which the defendant accepted, for goods which they had supplied to him, and it was held that the plaintiffs might sue as executors for the price of the goods supplied. *Marshall* v. *Broadhurst* (7), affirmed by *Edwards* v. *Grace* (8), is to the same effect. Then if the original administratrix could have maintained the action as administratrix had she been still living, it follows that the administratrix de bonis non of the original intestate is the proper person to sue, although the promise was made and the cause of action accrued to the administratrix and not to the intestate: *Elliott* v. *Kemp* (9); *Catherwood* v. *Chabaud* (10); *Hirst* v. *Smith* (11); *Werner* v. *Humphreys* (12). It is true that in the last three cases the plaintiff was described as administrator de bonis non, and the promise alleged, according to the fact, as made to the deceased administrator. But in *Hirst* v. *Smith* (11), Lord Kenyon, C.J., says, if the promise had been alleged to have been made to the plaintiff, the administrator de bonis non, a promise to the former administrator would have supported the declaration.

[BLACKBURN, J. That was admitted by counsel in argument, but the decision of the Court was, that the declaration alleging the promise according to the facts was right.]

Then the amendment ought clearly to be made: for it is a mistake to say that the defendant could not have safely paid money into court on the declaration as it stood, supposing the plaintiffs to be right; and if it had been amended before the trial, the defendant would not have paid money into court, because his contention was, and is, that the plaintiffs cannot sue at all for the work done by the first administratrix. The late case of *Boling-*

(1) 6 East, 405.
(2) 3 East, 103.
(3) 3 B. & Ald. 360.
(4) 1 T. R. 487.
(5) 5 Price, 412.
(6) 10 Bing. 51.
(7) 1 Cr. & J. 403.
(8) 2 M. & W. 190.
(9) 7 M. & W. 306.
(10) 1 B. & C. 150.
(11) 7 T. R. 182.
(12) 2 M. & G. 853.

broke v. *Kerr* (1) will be relied on by the other side; but there, although the business was the intestate's, the work was done two years after his death, and none of the materials were his; and there was no ground for saying, nor is it said, that the business was being carried on for the benefit of the estate; and the money recovered would not have been assets of the intestate. Moreover, the case is of no authority, as it ended in a stet processus, the defendant paying the amount of debt without costs.

Crompton, in support of the rule. First, there is a material variance; the female plaintiff is described as administratrix, and the goods are alleged to have been supplied by her.

[COCKBURN, C.J. The variance does not go to the merits; the defendant might have paid the 18*l.* into court on the declaration as it stands, but he contests the plaintiffs' right to it in any form.]

Secondly, the cause of action belonged to the widow, and did not pass to the administratrix de bonis non. In all the cases cited, either what was done by the executor was in carrying out the contracts of the testator, (whereas here all the work was fresh; and when there is a new contract the administrator must sue in his personal capacity: *Hosier* v. *Arundell* (2);) or the defendants, as in *Aspinall* v. *Wake* (3), had dealt with the executor as executor; and here there is no evidence of any such dealing.

[COCKBURN, C.J. Is it not a question of fact? If so, the presumption is, that so soon after the death the widow was carrying on the business as administratrix.

BLACKBURN, J. In Williams' Executors, vol. ii. p. 1532 (6th ed.), it is noticed that Lord Hardwicke had ruled that the executor was liable for the goodwill of a business as assets, and therefore the administratrix would do well to keep the business together with a view to disposing of the goodwill.]

These were repairs to the defendant's carriages, consequently the cause of action was really work and labour, the materials being simply ancillary: *Lee* v. *Griffin*. (4) *Bolingbroke* v. *Kerr* (1) is directly in point, that under circumstances like the present the

(1) Law Rep. 1 Ex. 222.
(2) 3 B. & P. 7.
(3) 10 Bing. 51.
(4) 1 B. & S. 272; 30 L. J. (Q.B.) 252.

1871

MOSELEY v. RENDELL.

administratrix could not have sued in her representative capacity; à fortiori the administratrix de bonis non could not sue.

COCKBURN, C.J. Two points have been made on behalf of the defendant. First, and this turns on the form of the declaration, that the promise is not rightly laid; secondly, that the female plaintiff is not entitled to sue, but the cause of action being founded on a promise to the widow of the deceased, the action should have been brought by the personal representative of the widow, and not by the female plaintiff as administratrix de bonis non of the original intestate. I will take the latter point first. It appears to me that the plaintiff as the administratrix de bonis non is the proper person to sue, because, although the promise was made to the widow, and the plaintiff is not her representative, yet the promise was made to the widow not in her personal capacity, but as administratrix of her husband. It has been long ago laid down, that though the executor of an executor represents the original testator, yet that rule does not apply to the administrator of an administrator, and that consequently when the estate of a deceased person has been left unadministered at the death of the administrator, it is necessary in order to complete the administration to take out administration de bonis non. Now if the promise was made to the original administratrix as administratrix, the proceeds of the action would be assets, and the present plaintiffs were the proper persons to sue. That this is so, take the illustration suggested by my Brother Blackburn; suppose the administratrix, instead of dying, had become bankrupt, would this cause of action have passed to her assignees? The answer seems conclusively to shew that the present plaintiffs are the proper persons to sue. But then, secondly, there is great force in the objection to the form of declaration, in alleging the promise to have been made to the female plaintiff herself; but the objection might have been cured at once by amendment; the amendment, however, was refused at the trial, owing to what now appears to have been a misapprehension of my Brother Hannen; but we can, and I think we ought, to amend even now to meet the justice of the case, and without costs; but as the amendment was at first refused, and so to some extent the defendant may have been induced

to obtain this rule, I think the rule should be discharged without costs.

1871

MOSELEY v. RENDELL.

BLACKBURN, J. I am of the same opinion. The estate of the intestate was represented by his widow, the mother of the present plaintiff, during her life, and on her death all things belonging to the estate were in abeyance until the appointment of an administratrix de bonis non, when the remaining estate vested in her, and not in the representative of the mother. Then, if there was any contract made with the widow as the personal representative of the deceased, it was part of his estate, and the benefit of it passed to the female plaintiff. But she ought to have declared, according to the truth, that after the death of the intestate, and while her mother was administratrix, a contract was made by the defendant with the mother as administratrix, and that it passed at the mother's death to the female plaintiff as administratrix de bonis non. But the declaration alleges the promise to the plaintiff herself, and not according to the truth, as in *Hirst* v. *Smith* (1), and *Werner* v. *Humphreys* (2), in each of which cases there was a promise laid to the administrator according to the truth. Such variances as these were at one time fatal, but now the courts have full powers of amendment, and the amendment should be made according to the facts, if on the facts the cause of action really passed to the female plaintiff. But then arises the second point urged for the defendant, that the widow had a cause of action personal to herself, which passed to her representative, and therefore no amendment could or ought to have been made; and of course neither could the defendant, if his contention be right, have safely paid money into court. Was, then, the cause of action such as to belong to the estate of the intestate, or was it personal to the widow? The cases point out an intelligible rule, that where the things done are of such a nature as to shew they were done by the executor or administrator as representing the deceased, so that the profits, if any, would be part of the assets, then, though the personal representative might be personally liable, and could not plead plene administravit; and although he might be liable in equity for a breach of duty if any loss occurred, still, if profits are realized

(1) 7 T. R. 182. (2) 2 M. & Gr. 853.

1871

MOSELEY v. RENDELL.

they would belong to the estate as part of the assets, and in such a case the personal representative may sue either in his representative or personal capacity. In the present case, as the Chief Justice has said, it is really a question of fact whether the administratrix when she did this work was winding up the estate or carrying on the business on her own account. In Williams' Executors, vol. ii. p. 1532 (6th ed.) *Gibblett* v. *Read* (1) is cited, in which Lord Hardwicke pointed out that there are many cases where no part of the property of a testator had been employed or made use of in carrying on the business, and yet the executor had been held accountable for the profits of the business as the testator's personal estate; and he especially instances the goodwill of a business as part of the estate for which the executor may be called upon to account. And when you are considering such questions time is of great importance, and in the present case the goodwill would have been lost if the business had been stopped at once when the intestate died. The business was carried on for a few weeks only on his premises, and the work was done with his tools and his materials, with the exception of one shaft only; all this was evidence that it was carried on by the widow only for the purpose of winding up the business, so as to dispose of it to the best advantage. And if she was carrying on the business for that purpose she was doing right, whereas had she been carrying it on for her own personal advantage she would have been doing wrong. Had, therefore, the question been left to the jury, the evidence would have been all one way, and they ought to have found that she was acting in her representative capacity and not in her personal capacity. *Bolingbroke* v. *Kerr* (2) was relied on for the defendant. In that case there was no evidence at all that the business of the intestate was being carried on for the benefit of the estate. More than two years after the death, the husband and the administratrix were carrying on the business, it is true, with the money of the intestate, and they were very possibly guilty of a devastavit; and all that was decided was that a contract made with them under such circumstances could not be taken to be a contract made on behalf of and as

(1) 9 Mod. 459.

(2) Law Rep. 1 Ex. 222. It is to be observed that the report in 35 L. J. (Ex.) 137, was not before the Court in the present case; see post p. 347.

representing the estate of the intestate. As to the amendment, I cannot see what possible objection can be urged to it; the Court has full power, under s. 222 of the Common Law Procedure Act, 1852, to make at all times such amendments as are necessary for determining in the existing suit the real question between the parties; and the real question here was, did this money belong to the estate of the original intestate, or was it part of the estate of his widow? That point having been decided in favour of the plaintiffs, the amendment was precisely what was intended by the Legislature. As to the terms on which it should be made, my Brother Hannen appears to have refused to amend because he thought the application too late, as, if the amendment had been made when the matter was first at chambers, the defendant might have paid money into court; but in this he was mistaken, as, if the amendment had been made, the defendant would not have paid money into court, because he considered that the plaintiffs had no right to sue at all. As, however, the defendant may have been misled from the view my Brother Hannen took in refusing the amendment, I agree that, though the amendment should be made without costs, the rule should be discharged without costs.

MELLOR, J., concurred.

HANNEN, J. I am of the same opinion. The first question is was the female plaintiff the right person to sue? That depends on whether the deceased administratrix could have sued for this cause of action as administratrix; if she could, then the right of action passed to the present administratrix de bonis non of the original intestate. I have always understood the criterion to be, whether the proceeds of the claim when recovered would be assets. In the present case, I thought the question precluded by the evidence that the materials, with a very slight exception, all belonged to the intestate, that they were worked up on his premises and with his tools. These facts, I thought, led irresistibly to the conclusion, that what had been done was by way of realizing the estate of the intestate, and the amount recovered would therefore be assets. As to the amendment, it is to be remembered that the application was made after the verdict had been directed for the

1871

MOSELEY v. RENDELL.

plaintiffs; the impression upon my mind at that time was that the matter had been brought to the attention of the plaintiffs at an earlier stage in the proceedings, and that they had, notwithstanding, elected to go on without amendment. But as we now regard the case, I see that the defendant has not been prevented from paying money into court, because there is nothing to shew (but the contrary) that he would have paid money into court had the amendment been made, his contention being that the plaintiffs were not entitled to sue for the money at all. If I had reserved the point, as I think I ought, the amendment would have been ordered as of course; it ought therefore to be made, but I agree, under the circumstances, there should be no costs of this rule.

Rule discharged without costs. (1)

Attorney for plaintiffs: *Kearsey.*
Attorneys for defendant: *Williamson, Hill, & Co.*

Feb. 26.

ABBOTT AND ANOTHER, EXECUTORS, &c. *v.* PARFITT.

Action, Parties to—Executors, Action by, for Goods supplied while carrying on Testator's Business.

The executors of a deceased baker carried on the business for about ten months under directions in the will, and during that time they supplied bread and flour to the defendant, but it did not appear that any of the materials had belonged to the testator:—

Held, that, as the money when recovered would be assets of the testator, the plaintiffs could sue as executors.

Bolingbroke v. *Kerr* (Law Rep. 1 Ex. 222; 35 L. J. (Ex.) 137) discussed.

ACTION in the Mayor's Court of London, brought by the plaintiffs as executors of William Dick, deceased, to recover 12*l.* 19*s.* 2*d.* for money due and owing from the defendant to them as such executors.

Plea, never indebted.

At the trial it was proved that the testator carried on the business of a baker up to his death on the 28th of July, 1869. Probate was granted to the plaintiffs, the executors, on the 10th of

(1) See the next case.

September, and they carried on the business under the terms of the will until the 25th of June, 1870, when they sold it. They employed the widow of the testator to manage the business for them, and she supplied bread and flour, to the amount claimed, to the defendant from the 2nd of August, 1869, to the 25th of June, 1870.

The Deputy Judge nonsuited the plaintiffs, giving them leave to move this Court to set aside the nonsuit, and enter a verdict for the amount claimed, if the Court should be of opinion that the defendant was liable to the plaintiffs as executors.

H. C. Bennett obtained a rule accordingly. (1) He cited *Aspinall* v. *Wake* (2), and Williams' Executors (6th ed.), vol. i. pp. 824-5.

H. James, Q.C., and *Finlay*, shewed cause. The defendant dealt with the widow; but no doubt, as she was only agent, the plaintiffs, as principals, can sue on contracts made with her; but they cannot maintain an action as executors. *Moseley* v. *Rendell* (3) will be relied on by the other side; but there the goods belonged to the intestate. Here it was not shewn, nor is it likely, that any of the bread and flour belonged to the testator. *Bolingbroke* v. *Kerr* (4) is therefore in point, where it was held that the administratrix could not sue as such for goods supplied by her and her husband, in carrying on the intestate's business for the benefit of the estate.

[BLACKBURN, J. In the Law Reports there is no statement that the business was carried on for the benefit of the estate.

HANNEN, J. On moving the rule, Williams' Executors (6th ed.), vol. i. p. 825, was cited, where the author, after alluding to the earlier cases, proceeds: "However, the rule may now be regarded as firmly established by the later cases, that wherever the money recovered will be assets, the executor may sue for it, and declare in his representative character."]

In the last (6th) edition of Williams' Executors, vol. ii. p. 1730, n. (g), *Bolingbroke* v. *Kerr* (4) is cited from the Law Reports, as an authority that an administrator cannot sue in his representative character on contracts made after the intestate's death in carrying

(1) Under 20 & 21 Vict. c. clvii., s. 10.

(2) 10 Bing. 51.

(3) Ante, p. 338.

(4) Law Rep. 1 Ex. 222; 35 L. J. (Ex.) 137.

1871

ABBOTT v. PARFITT.

on the intestate's business. So that case has the approval of the author.

[BLACKBURN, J. He cites the decision from the Law Reports in a note, without comment, or going into the facts of the case. And the text of his book remains precisely as before, that if the money recovered would be assets the executor may sue as executor. In *Edwards* v. *Grace* (1) it was decided that an executor might sue as such for work done by him as executor. And in Williams' Executors (6th ed.), vol. ii. pp. 1531–2, it is said: "If an executor employ the testator's goods in trade, the profits shall be assets: and whether the executor takes upon himself to carry on the testator's trade, or does so in pursuance of a provision in articles of partnership entered into by the deceased, or by direction of the testator contained in his will, or under the direction of the Court of Chancery, the profits of such trade shall be assets, for which he shall be accountable." The author then refers to *Giblett* v. *Read* (2), in which Lord Hardwicke said: "That there were many cases where no part of the property of a testator had been employed or made use of in carrying on the business, and yet the executor had been held accountable for the profits of the business as the testator's personal estate; as in the instance of physical secrets or nostrums, when everything was carried on with materials purchased after the testator's death, and yet the nostrum was part of the personal estate of the testator." And in a note it is said, that Lord Hardwicke further added, that the executor might be accountable for the value of the goodwill of the testator's business.]

The money may be assets in equity, so as to make the executor accountable for them, and yet it does not follow that the executor can sue at law for the money as executor. In Williams' Executors, vol. ii. p. 1654: "With respect to the liability of an executor or administrator carrying on the trade of the deceased, the general principle is, that the trade is not transmissible, but is put an end to by the death of the trader; executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the Court of Chancery, they run great risk, even although the will contains a direction that they should continue

(1) 2 M. & W. 190. (2) 9 Mod. 459.

the business of the deceased." In all the cases (which are collected in Williams' Executors (6th ed.), vol. i. p. 822) in which an executor has been held able to sue, such as *Cowell* v. *Watts* (1), *Aspinall* v. *Wake* (2), and *Marshall* v. *Broadhurst* (3), the contracts were contracts made with the testator and carried out by the executor, or the defendant dealt with the plaintiff expressly as executor, or at least the materials belonged to the testator.

H. C. Bennett, in support of the rule. There can be no doubt that the plaintiffs carried on the business as executors, for they did so under directions in the will, of course for the purpose of preserving the goodwill: and therefore the profits, and consequently the defendant's debt, would be assets. In *Cowell* v. *Watts* (4), Lord Ellenborough, C.J., says that the rule ought to be adhered to, that where the money when recovered would be assets, the executor may declare for it in his representative character. And Parke, B., in *Heath* v. *Chilton* (5), says: "It must certainly be considered as settled by the case of *Cowell* v. *Watts* (4), and many others subsequently decided, that an executor may sue in his representative character on contracts made with himself, where the money when recovered would be assets; and the rule so established ought not to be disturbed." [He was then stopped by the Court.]

BLACKBURN, J. The rule must be made absolute to set aside the nonsuit, and enter a verdict for the plaintiffs. The plaintiffs sued in their capacity of executors of one Dick, a baker. They carried on the business, under directions in the will, for the benefit of the estate, and they continued to do so for about ten months, when they sold it. During the whole time they employed Mrs. Dick, the widow, to manage the business as their agent. The defendant was supplied with bread by Mrs. Dick, and although he admits that, as she was the plaintiffs' agent, they, as principals, had a right to sue him, yet he contends they cannot sue in their representative character. The later cases have—as Parke, B., says in the passage cited from *Heath* v. *Chilton* (5)—conclusively settled that an executor has the option to sue in his representative cha-

(1) 6 East, 405.
(2) 10 Bing. 51.
(3) 1 C. & J. 403.
(4) 6 East, at p. 409.
(5) 12 M. & W., at p. 637.

1871

ABBOTT v. PARFITT.

racter on contracts made with himself, where the money, when recovered, would be assets (though in a great many such cases he might sue in his personal capacity), and he adds that that rule ought not to be disturbed; in this I fully agree. Then would this money be assets? As long ago as Lord Hardwicke's time (see the passage I cited from Williams' Executors, (6th ed.) vol. ii. p. 1532 (1)), it was decided that the executor is accountable as for part of the assets where he carries on the testator's business, either voluntarily or pursuant to the directions of the will, or of the Court of Chancery. And the ground is very plain: the goodwill of the business is part of the assets, and is often very valuable; and even if there is no direction in the will, the executor may well carry on the business so as to preserve the goodwill till he can dispose of it to advantage. When the executors are acting in conformity with the directions of the will, there can be no doubt in what character they are acting. But it sometimes happens—and this is what often raises a difficulty—that the executor or administrator is also beneficially interested as legatee or next of kin, and as soon as he has assented to take, then the benefit would be no longer assets; and, on the other hand—as, for instance, in the case of a lease—he becomes personally responsible for any burthens attached to the subject-matter. And the question therefore sometimes might be, in what character was the business being carried on by the executor or administrator? By losing sight of this distinction, *Bolingbroke* v. *Kerr* (2) may very probably have been misunderstood. There the intestate died leaving a daughter, a minor, who however afterwards took out administration; probably, therefore, she was an only child and sole next of kin; she married, and she and her husband carried on the business for more than two years; the business was carried on with money which the wife had received from the intestate's estate—probably therefore with the wife's fortune; but it is hardly likely that they were carrying it on for such a length of time for the benefit of the estate. It is much more likely that it was carried on, though, in point of fact, by the administratrix, yet by the administratrix after having assented to take it as next of kin and so as belonging to her, in which case the husband

(1) Ante, p. 348. (2) Law Rep. 1 Ex. 222; 35 L. J. (Ex.) 137.

ought clearly to have sued alone. So understood, the case would be in perfect conformity with the decided cases. In the Law Journal, it is true, it is said that the administratrix and her husband carried on the business for the benefit of the deceased's estate; but in the Law Reports there is no such statement, and I cannot but think that there must be a mistake in the Law Journal. For if that really had been found as a fact, the decision must have overruled very numerous cases on the subject, or the Court must have distinguished them in some way which I cannot understand; and it is incredible that the Court should have done this sub silentio. The facts in the Law Reports leave the case consistent with previous cases, and the report is probably right. And the Law Journal must have misapprehended what was the evidence upon which the point was reserved.

MELLOR, J. I am of the same opinion. The case is quite clear on all the authorities, unless *Bolingbroke* v. *Kerr* (1) be an authority to the contrary. But I cannot help thinking that the Law Journal report is mistaken, and that the facts in the Law Reports are accurately given, from which it may be inferred that the business was really carried on for the benefit of the daughter, and not for the benefit of the intestate's estate. In the present case, however, it is very clear, as it is expressly found that the business was carried on by directions in the will; consequently the money recovered would be assets, and the plaintiffs would be entitled to sue as executors. The nonsuit therefore ought to be set aside, and a verdict entered for the plaintiffs.

HANNEN, J. I am of the same opinion. In *Moseley* v. *Rendell* (2), I rested my judgment on the fact that the materials employed belonged to the intestate; that was sufficient for the decision of that case, and it was unnecessary to consider the case of *Bolingbroke* v. *Kerr* (1). I think that the explanation already given of that case is the true explanation, and that it does not really conflict with the well-established rule, as given in Williams' Executors, vol. i. p. 825 (6th ed.), which seems to me the best and most sensible rule that can be laid down, that the right of

(1) Law Rep. 1 Ex. 222; L. J. 35 (Ex.) 137.

(2) Ante, p. 338.

1871

ABBOTT v. PARFITT.

the executor to sue in that character must depend on whether the money he sues for would be assets when recovered.

Rule absolute.

Attorney for plaintiffs: *G. Palmer.*
Attorney for defendant: *F. R. Smith.*

Jan. 31.

THE QUEEN *v.* STANGER.

Criminal Information for Libel, Rule for—Evidence of Publication—Affidavit, Sufficiency of.

A rule nisi for a criminal information for libel having been obtained against J. S., on affidavits which stated that a copy of a newspaper had been purchased from a salesman in the office of the newspaper, and that by a footnote to the newspaper J. S. was stated to be the printer and publisher of the newspaper, and that the deponent believed J. S. to be the printer and publisher, the Court discharged the rule on the ground that the affidavits contained no legal evidence of publication, which was necessary in order to obtain leave to file a criminal information.

Quære, whether a defect in the affidavits, on which the rule nisi for a criminal information has been obtained, can be supplied by a statement in an affidavit of the defendant made in shewing cause against the rule.

RULE calling upon John Stanger to shew cause why a criminal information should not be filed against him for an alleged libel.

In moving the rule, an affidavit was made by one Longstaffe as follows:—"On the 30th of May last past I attended at the publishing office of the newspaper called the *Newcastle Daily Chronicle*, situate, &c., and purchased and paid for a copy of the said *Newcastle Daily Chronicle*, dated the 30th of May, 1870 [in which paper the alleged libel was contained], and which I then and there received from William Gray, a clerk or salesman in the said office, and which said newspaper is now produced and shewn to me, and marked with the letter 'A.'" And a further affidavit was made by one Crossman, as follows: "I have referred to the newspaper mentioned in the affidavit of Longstaffe, and verified by him, and which said newspaper is marked 'A.,' and I say that by a footnote printed at the end of the said newspaper John Stanger is stated to be the printer and publisher of the newspaper, and I say that

John Stanger is, as I believe, the printer and publisher of the said newspaper."

On shewing cause, the defendant made the following affidavit:—

"I am the accountant and book-keeper of the proprietor of the *Newcastle Daily Chronicle* newspaper. I did not write or order the publication of the article complained of. I do not write any of the articles; nor do I order them to be published; neither do I read any of the articles before they are printed and published; nor have I any control over the writers of the articles; nor any discretion as to the appearance or non-appearance in the newspaper of any article or paragraph."

Digby Seymour, *Q.C.*, and *Udall*, shewed cause. There is no evidence that the defendant published the libel. The affidavit of one of the deponents states that he believes the defendant is the printer and publisher of the paper which contained the libel; a statement made on belief is not legal evidence: *Rex* v. *Willett* (1); it is not such evidence as would support a bill of indictment. This Court, in granting or making absolute a rule for a criminal information, is in the same position as a grand jury: *Rex* v. *Woolmer* (2), per Littledale, J., and the prosecutor must adduce such evidence as would justify a grand jury in finding a true bill on an indictment: *Ex parte Williams*. (3) The same law is laid down in the text-books: Cole on Informations, pp. 55 and 62; Corner's Crown Practice, p. 172. Under the old law it was not necessary that the prosecutor should adopt the statutory mode of proof, but he must adduce direct legal evidence that the defendant is the printer and publisher of the libel: *Reg.* v. *Baldwin*. (4) That case also decides that any defect in the affidavit of the prosecutor cannot be supplied by a statement in the defendant's affidavit. This proposition is laid down in express terms in Cole on Informations, p. 62, on the authority of *Rex* v. *Baldwin* (4), and a distinction is taken between a quo warranto, which is in the nature of a civil proceeding brought to try a right, (in which case it seems a statement in the affidavits of the defendants may be used to supply a defect in those of the relator: *Rex* v. *Mein* (5)) and the case of a criminal

(1) 6 T. R. 294.
(2) 12 A. & E. at p. 422.
(3) 5 Jur. 1133.
(4) 8 A. & E. 168.
(5) 3 T. R. 596.

1871

THE QUEEN v. STANGER.

information, which is in the nature of a criminal proceeding. Here, however, the affidavit of the defendant does not supply the information, even if it could be supplied. His affidavit neither denies nor admits that he is the printer or publisher of the paper in question, and as the statement in the affidavits filed on behalf of the prosecution are not legal evidence, the defendant is not bound to deny those statements.

Sir J. D. Coleridge, S.G., and *Beresford*, in support of the rule. The affidavits of Longstaffe and Crossman, if read together, sufficiently shew that the defendant was the printer and publisher of the paper containing the alleged libel. At the time *Reg.* v. *Baldwin* (1) and *Ex parte Williams* (2) were decided, 6 & 7 Wm. 4, c. 76, ss. 6 and 8, was in force, and the prosecutor had it in his power to give distinct evidence of publication, and it was quite right to insist on strict proof where it could be supplied; but the chief part of 6 & 7 Wm. 4, c. 76, is repealed by 32 & 33 Vict. c. 24, and no statutory proof of publication can now be offered, and it is impossible at common law to supply better evidence than that contained in the affidavits. It is primâ facie evidence; and not being denied or contradicted by the defendant, the presumption is strong that the defendant is the printer and publisher; and *Rex* v. *Mein* (3) is in point to shew that the defendant's affidavit can be looked at to supply any defect in those of the prosecutor.

BLACKBURN, J. The rule must be discharged on the ground that the affidavits do not contain any evidence of a publication of the libel by the defendant. The affidavits only state that one Longstaffe attended at the publishing office of the newspaper, and purchased a copy from the clerk in the office, and that in a footnote printed at the end of the newspaper John Stanger, the defendant, is stated to be the printer and publisher, and another person swears he believes that Stanger is the publisher of the newspaper. Is an affidavit which is made only on information or belief legal evidence to shew that the defendant is the publisher of the alleged libel? I think it is not sufficient legal evidence. This was decided as long ago as Lord Kenyon's

(1) 8 A. & E. 168. (2) 5 Jur. 1133.
(3) 3 T. R. 596.

time. In *Rex* v. *Willett* (1) the rule was refused, because the statement in the affidavit of what the deponent had been informed was not legal evidence; and the Court said: "If they were to grant a rule calling on the defendant to shew cause why an information should not be filed against him, it would be calling on him either to give evidence (on the shewing cause) against himself, or leaving the rule to be made absolute on this affidavit alone, which was not legal evidence." So that the ratio decidendi of that case was, that an affidavit made on information or belief was not sufficient evidence to call upon the other side to make an answer to the charge. The same principle was acted on in *Ex parte Williams.* (2)

As to the second question, though it is not clear, on the affidavits filed by the prosecution, that the defendant is the publisher of the newspaper containing the libel, can the Court look at the affidavits filed by the defendant to supply the omission? In *Rex* v. *Mein* (3) Lord Kenyon says: "Upon conference with my Brothers, I find that it is not unusual to have recourse to the affidavits against the rule in order to come (if possible) at the whole truth of the transaction." Mr. Cole, in his book on Criminal Informations, p. 62, distinguishes that case from *Reg.* v. *Baldwin* (4), on the ground that a writ of quo warranto is considered in the nature of a civil proceeding to try a civil right or title. He says: "On applications for a criminal information, a defect in the prosecutor's affidavits cannot be so supplied; and therefore, if the affidavits on which a rule nisi is granted for a criminal information for a libel do not sufficiently swear to a publication, the rule cannot be supported, though the affidavits on the other side admit the publication." The distinction he makes between a criminal and civil proceeding is not, I think, a sound one. In either case, whether the application be for a criminal information or a writ of quo warranto, we are acting under the statute (5), and the question would be, are the facts such as to make it right for the Court to grant the application? I think the rule laid down in *Rex* v. *Mein* (6) is the sounder. But in the present case it is not necessary to decide the point, for the defendant's affidavit

(1) 6 T. R. 294.
(2) 5 Jur. 1133.
(3) 3 T. R. at p. 597.
(4) 8 A. & E. 168.
(5) 4 & 5 Wm. & M. c. 18.
(6) 3 T. R. 596.

1871

THE QUEEN v. STANGER.

says nothing as to his being the publisher of the newspaper; and, according to *Rex* v. *Willett* (1), he cannot be called upon to answer so as to supply evidence against himself.

MELLOR and HANNEN, JJ., concurred.

Rule discharged.

Attorneys for prosecution: *Shum & Crossman.*
Attorneys for defendant: *Flux & Leadbitter.*

(1) 6 T. R. 294.

END OF HILARY TERM, 1871.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

EASTER TERM, XXXIV VICTORIA.

CLARKE AND GOODGE, APPELLANTS; STANFORD, RESPONDENT. 1871 *April* 29.

Hackney Carriage—Railway Station—"Plying for Hire"—The Metropolitan Public Carriage Act, 1869 (32 & 33 *Vict. c.* 115), *s.* 4.

A carriage, whilst on the premises of a railway company, under a contract with them to await the arrival of their trains, for the conveyance of any passenger by railway who chooses to hire it, is plying for hire within the meaning of the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), s. 4; and is therefore a hackney carriage, and must be licensed.

CASE stated by Justices of Middlesex under 20 & 21 Vict. c. 43.

The information charged that F. G. Clarke did unlawfully ply for hire, with an unlicensed carriage, at Harrow railway station, contrary to 32 & 33 Vict. c. 115, s. 7, and that S. Goodge did unlawfully act as driver of an unlicensed hackney carriage at Harrow railway station, contrary to the same section.

The following facts were proved:—

The London and North Western Railway Company have a station at Harrow, within the limits of the Metropolitan Police District, which are those also of the Metropolitan Public Carriage Act, 1869, (32 & 33 Vict. c. 115). The yard in front of the station is enclosed, and is their private property. The appellant Clarke is a livery

1871

CLARKE v. STANFORD.

stable keeper. The railway company had, upon certain terms, arranged with the appellant to supply certain broughams, flies, and carriages, part of the terms being that the vehicles should stand on the premises of the company within the yard to await the arrival of passengers by the trains. The appellants' servants who drove the flies were instructed not to invite passengers by speech, but to wait until called by a servant of the company, or hired by the passenger himself. When so called, the person requiring the fly entered, and was driven according to his own directions and paid the fare.

It was contended by the respondent that a fly so used was within s. 4 of the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), which defines a hackney carriage to be "any carriage for the conveyance of passengers which plies for hire within the limits of this Act, and is not a stage carriage," and, therefore, required to be licensed, and to observe the regulations prescribed by that Act.

It was contended on behalf of the appellants that, inasmuch as the fly was in the private yard of the railway company, it was not "plying for hire" within the meaning of the statute.

The justices were of opinion that the fly, while waiting in the yard of the railway station, was, in fact, "plying for hire" within the meaning of the definition of a hackney carriage in s. 4 of 32 & 33 Vict. c. 115; and were of opinion that the fact that the driver was ready to take up any passenger coming by rail as a fare was sufficient, and that the circumstance that the yard was enclosed, and that other hackney carriages were not allowed there, was of no moment, and they therefore convicted the appellants.

The question for the opinion of the Court was whether such construction of the statute is right.

Bosanquet, for the appellants. The conviction cannot be supported. The carriage was not "plying for hire" within the meaning of s. 4. Plying for hire is a plying for hire generally; here the fly was waiting for a particular class of persons, and could not be hired by any one of the public. If *Case* v. *Storey* (1) is rightly decided, there was no plying for hire. Kelly, C.B., in his judgment,

(1) Law Rep. 4 Ex. 319.

says: "Plying for hire must mean that the carriage is to be at the disposal of any one of the public who may think fit to hire it." That case was decided on a different statute, but that part of the judgment is in point. If the carriage was in the private yard of an hotel keeper, or waiting on the premises of a gentleman, it could not be said to be plying for hire; here it is waiting in the private yard of a railway company.

1871

CLARKE v. STANFORD.

F. M. White, for the respondent, was not heard.

COCKBURN, C.J. I think this case is clearly within the statute. The owner and driver of this carriage were rightly convicted, as the carriage was plying for hire. In *Case* v. *Storey* (1), the question turned upon a different statute, and the decision was that under that statute there must be a plying for hire in a public place; this case is therefore not governed by that decision. The words of the present statute, "plying for hire," are satisfied by the facts which exist in the present case. Carriages are admitted within the premises of the railway company at Harrow under a contract, by which they engage to convey any passengers who come by railway, and although it is not expressly so found in the case, yet it is clear that the appellants' carriages are exclusively for the use of passengers who come by the railway. I assume that the use of the carriage is confined to the purposes of the passengers coming by railway; still that is a plying for hire. The case put by Mr. Bosanquet, of a carriage being on a man's own premises ready to go out if required, is not what can be understood as "plying for hire" within the meaning of this Act. But where a person has a carriage ready for the conveyance of passengers, in a place frequented by the public, he is plying for hire, although the place is private property. The public is entitled to travel by railway, and has a right to pass over the premises of the railway to get out, and if a man is standing on those premises with his carriage to take the public, he is plying for hire. The legislature has omitted the words "public place," and this appears to have been done intentionally and advisedly. I think the facts shew that there was a plying for hire within the statute, and the carriage was therefore a hackney carriage within the statute.

(1) Law Rep. 4 Ex. 319.

1871

CLARKE v. STANFORD.

MELLOR, J. In a certain sense, the place where the carriage was standing was private property, and the railway company could exclude cabs from coming there. *Case* v. *Storey* (1) does not apply. Under the statute on which that case was decided, a hackney carriage was defined as a carriage used for the purpose of standing or plying for hire in any public street or road. In the present Act the words "public street or road" are omitted, and this is a carriage for the conveyance of passengers, which plies for hire within the meaning of 32 & 33 Vict. c. 115. It is said that there is no plying for hire because the carriage is admitted on the railway premises, under certain regulations; that is, it is only to carry persons who come by train. But what is the carriage there for? though the driver makes no sign, he is there to be hired by persons who arrive by train, and there is no restriction as to the persons who, arriving by train, shall hire the carriage: it is therefore plying for hire, within the meaning of the statute.

LUSH, J. I am of the same opinion. It is no longer necessary that a hackney carriage, to be "plying for hire," should be in a public street. The recent statute, 32 & 33 Vict. c. 115, has dropped these words. This carriage was awaiting the arrival of a train, in order to be hired by any person who might come by the train. That is a plying for hire, within the meaning of this statute.

Judgment for the respondent.

Attorney for appellants: *Venn.*
Attorneys for respondent: *Ellis & Ellis.*

(1) Law Rep. 4 Ex. 319.

DUTTON *v.* MARSH AND OTHERS. 1871 *May* 8.

Promissory Note—Personal Liability of Maker, described as "Director of a Company"—Effect of affixing Seal of Company to a Note.

Four directors of a joint-stock company signed their names to a promissory note, "We the directors of the Isle of Man Slate Company, Limited, do promise to pay J. D. 1600*l.* with interest at 6 per cent. till paid for value received." And at one corner of the note the company's seal was affixed, with "witnessed by L. L.":—

Held, that the directors were personally liable as makers of the note: for that there was nothing in the note itself to exclude this personal liability, and the fact that the company's seal was affixed was not sufficient to shew that the note was signed on behalf of the company.

DECLARATION by the plaintiff, as payee, against the defendants as makers of a promissory note.

Plea: that the defendants did not make the note.

Issue thereon.

At the trial before Cleasby, B., at the Liverpool Summer Assizes, 1870, it appeared that the plaintiff lent 1600*l.* to the Isle of Man Slate and Flag Company, Limited, of which the defendant Marsh was a director and chairman, and the other defendants directors; and the following note, signed by the defendants, was handed to the plaintiff:

"Isle of Man, 7th January, 1864.

"We the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay John Dutton, Esq., the sum of 1600*l.* sterling, with interest at the rate of 6 per cent. per annum, until paid for value received.

Witnessed by	Richard J. Marsh, Chairman.
(L. S.)	Joseph Higgins.
Leslie Lochart.	Samuel Broadbent.
	Henry Johnson."

In the corner of the note the company's seal was affixed, with "Witnessed by Leslie Lochart."

Some letters and facts which took place between the parties when the money was borrowed were given in evidence, but the judgment of the Court renders it unnecessary to notice them.

The judge directed a verdict for the plaintiff, with leave to move

1871

DUTTON v. MARSH.

to enter a verdict for the defendants, on the ground that the defendants were not personally liable.

A rule having been obtained accordingly,

May 6. *Holker, Q.C.*, and *Herschell*, shewed cause. There is nothing on the face of this note to exclude the personal liability of the defendants, which primâ facie attaches to persons who sign their names as makers of a promissory note. Lord Ellenborough says in *Leadbitter* v. *Farrow* (1), "Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion?" And in all the cases in which the defendant has been held not liable, there has been some equivalent expression so as to exclude personal liability. On the other hand the defendant has always been held liable, unless some such words of exclusion have been used, although it may be apparent on the face of the instrument that he is signing as a director or other officer of a company. Thus in *Price* v. *Taylor* (2), the defendants were held liable, although they were described as the trustees and secretary of a building society.

[HANNEN, J. *Bottomley* v. *Fisher* (3) was a similar decision.]

In *Mare* v. *Charles* (4) the drawee was held personally liable, although he had accepted "for the company." But in *Aggs* v. *Nicholson* (5) the defendants, having expressly promised on "behalf of the company," were held not liable. In *Lindus* v. *Melrose* (6) there were the words "for value received for and on account of the company." So in *Alexander* v. *Sizer* (7) the defendant signed "for" the railway company.

[COCKBURN, C.J. The law is thus summed up in Smith's Leading Cases (8), and, I think, rightly:—"In all these cases the question whether the person actually signing the contract is to be

(1) 5 M. & S. 345, 349.

(2) 5 H. & N. 540; 29 L. J. (Ex.) 331. 6 Jur. N.S. 402.

(3) 1 H. & C. 211; 31 L. J. (Ex.) 417. 8 Jur. N.S. 895.

(4) 5 E. & B. 978; 25 L. J. (Q.B.) 119. 2 Jur. N.S. 234.

(5) 1 H. & N. 165; 25 L. J. (Ex.) 348.

(6) 3 H. & N. 177; 27 L. J. (Ex.) 326. 4 Jur. N.S. 488.

(7) Law Rep. 4 Ex. 102.

(8) Notes to *Thomson* v. *Davenport*, 2 Sm. L. C., at p. 344, 6th ed.

deemed to be contracting personally, or as agent only, depends upon the intention of the parties as discoverable from the contract itself; and it may be laid down as a general rule that, where a person signs a contract in his own name without qualification, he is primâ facie to be deemed to be a person contracting personally; and in order to prevent his liability from attaching, it must be apparent from the other portions of the document, that he did not intend to bind himself as principal." The question here is, Is not the putting of the company's seal to the note equivalent to saying "on behalf of the company?"]

Surely not; it cannot do more than shew that, as between the directors and the company, the transaction is on behalf of the company; but it can be no intimation to the plaintiff that the directors are not to be held personally liable to him. In *Aggs* v. *Nicholson* (1) the seal of the company was attached; but the Court acted only on the words "on behalf of the company" as excluding personal liability. In *Lindus* v. *Melrose* (2) Crompton and Willes, JJ., expressed considerable doubt as to the construction of the instrument, and they guarded themselves from being supposed, by concurring in the judgment, to throw any doubt upon the rule that an agent putting his name to a mercantile instrument is liable as principal, unless the instrument distinctly shews that he signs as agent, and in this the rest of the Court of Exchequer Chamber concurred.

Manisty, Q.C., and *Edwards*, in support of the rule. For what purpose could the seal of the company have been attached, but to shew the note was drawn on behalf of the company, as was held in *Halford* v. *Cameron's Coalbrook, &c., Co.* (3)? So in *Aggs* v. *Nicholson* (1), the Court, in giving judgment, took notice of the fact that the company's seal was attached. No case, therefore, has decided that the directors signing are personally liable on a bill or note to which the company's seal is attached. In *Alexander* v. *Sizer* (4), in which the Court held the defendant's liability to be excluded, Kelly, C.B., distinguishes the case of *Healey* v. *Story* (5), on the

(1) 1 H. & N. 165; 25 L. J. (Ex.) 348.

(2) 3 H. & N., at p. 182; 27 L. J. (Ex.) at p. 329.

(3) 16 Q. B. 442; 20 L. J. (Q.B.) 160.

(4) Law Rep. 4 Ex., at p. 105.

(5) 3 Ex. 3; 18 L. J. (Ex.) 8.

1871

DUTTON v. MARSH.

ground that in that case the defendants "jointly and severally" promised, which shewed that, although "for" the company was added, they intended to make themselves personally liable; there are no such words in the present case.

Cur. adv. vult.

May 8. The judgment of the Court was delivered by

COCKBURN, C.J. This case was argued before my Brothers Mellor and Hannen and myself. It was an action upon a promissory note in this form:—"We, the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay John Dutton the sum of 1600*l.* sterling, with interest at the rate of 6 per cent. per annum until paid for value received." This was signed by the defendant Marsh as chairman, and by the other defendants who were directors, and the seal of the company is affixed to the promissory note. The question is, whether the promissory note is binding upon the persons who signed it, or was binding not upon them, but upon the company.

Let us assume for the present that the seal was not affixed. The effect of the authorities is clearly this, that where parties in making a promissory note or accepting a bill, describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing,—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company,—they are individually liable. But, on the other hand, if they state they are signing the note or the acceptance on account of or on behalf of some company or body of whom they are the directors and the representatives, in that case, as the case of *Lindus* v. *Melrose* (1) fully establishes, they do not make themselves liable when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represented.

If, therefore, in this case it had simply stood that the defendants, described as directors, but without saying "on behalf of the company," signed the promissory note, it is clear they would have been

(1) 3 H. & N. 177; 27 L. J. (Ex.) 326.

personally liable, and could not be considered as binding the company. But this case was rendered doubtful by the fact of the corporate seal being affixed to the document. It does not purport in form to be a promissory note made on behalf of or on account of the company. So far as the written portion of it goes it is totally without any such qualifying expression, but some doubt was raised in my mind whether the affixing of the seal might not be taken as equivalent to a declaration in terms on the face of the note, that the note was signed by the persons who put their names to it on behalf of the company, and not on behalf of themselves. But on consideration I agree with my learned Brothers that that effect cannot be given to the placing of the seal of the company upon the note. it may be that that was simply for the purpose of ear-marking the transaction, or, in fact, shewing as to the directors that, as between them and the company, it was for the company they were signing the note, and that it was a transaction in which the proceeds to be received upon the note would operate to the benefit of the company; but there is no case that goes the length of saying that the affixing of the seal, where the parties do not otherwise use terms to exclude their personal liability, would have that effect. We think it is going too far to say that the mere affixing of the seal has that effect. The rule, therefore, will be discharged.

Rule discharged.

Attorneys for plaintiff: *Gray, Johnston, & Mounsey, for Tryer, Smith, & Kenion, Liverpool.*

Attorney for defendants: *Holcombe.*

1871

April 29.

COLEMAN, Appellant; BATHURST, Respondent.

Game, Reservation of—1 & 2 *Will.* 4, *c.* 32, *ss.* 8, 12—*Agreement by Tenant not to kill Game.*

An agreement, under which a tenant held, contained a stipulation that he would not destroy any game, and would endeavour to preserve all game bred and being on the farm. He was convicted under s. 12 of 1 & 2 Will. 4, c. 32, that he, being the occupier of certain land, the right of killing the game on such land being reserved to his landlord, did unlawfully kill upon such land certain game:—

Held, by Cockburn, C.J., and Mellor, J. (Lush, J., dissenting), that the stipulation in the agreement could not be construed as a reservation of game to the landlord, and that the conviction ought to be quashed.

Case stated by Justices of Wiltshire, under 20 & 21 Vict. c. 43.

The appellant was convicted under s. 12 of 1 & 2 Will. 4, c. 32 (1),

(1) By 1 & 2 Will. 4, c. 32, s. 8, "Nothing in this Act contained shall authorize any person seised, or possessed of, or holding any land, to kill or take the game, or to permit any other person to kill or take the game upon such land, in any case where, by deed, grant, lease, or any written or parol demise or contract, a right of entry upon such land for the purpose of killing or taking the game hath been or hereafter shall be reserved or retained by, or given or allowed to, any grantor, lessor, or other person whatsoever; nor shall anything in this Act contained defeat or diminish any reservation, exception, covenant, or agreement already contained in any private Act of Parliament, deed, or other writing relating to the game upon any land, nor in any manner prejudice the rights of any lord or owner of any forest, chase, or warren, or of any lord of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, or of any steward of the Crown of any manor, lordship, or royalty appertaining to His Majesty."

S. 12: "Where the right of killing the game upon any land is by this Act given to any lessor or landlord, in exclusion of the right of the occupier of such land, or where such exclusive right hath been or shall be specially reserved by or granted to, or doth or shall belong to, the lessor, landlord, or any person whatsoever other than the occupier of such land, then and in every such case, if the occupier of such land shall pursue, kill, or take any game upon such land, or shall give permission to any other so to do, without the authority of the lessor, landlord, or other person having the right of killing the game upon such land, such occupier shall, on conviction thereof before two justices of the peace, forfeit and pay for such pursuit such sum of money not exceeding 2*l.*, and for every head of game so killed or taken such sum of money not exceeding 1*l.*, as to the convicting justices shall seem meet, together with the costs of the conviction."

for that he, being the occupier of certain land, the right of killing the game upon such land being reserved to his landlord the respondent, did unlawfully kill upon such land certain game.

At the hearing it was proved that the appellant was tenant to the respondent of a farm, under a written agreement, which contained the following clause: "And the said John Coleman agrees that he will not destroy any game, nor keep any hound or other dog destructive thereof, and will at all times, at the request of Sir F. Bathurst or his agent, forbid any person or persons hunting, shooting, coursing, fishing, or trespassing on the farm, or any part thereof, and will endeavour to the utmost of his power to preserve all game bred and being thereon." On the 15th of September, 1870, the appellant shot four hares on the farm, and when he was accosted by the respondent's keepers, admitted having done so, but asserted that he had a right to kill the game, as he had taken out a game certificate.

It was contended for the appellant that the exclusive right to the game had not been reserved by this agreement to the respondent.

The question for the opinion of the Court was, whether, upon a true construction of the agreement, the game was reserved to the respondent.

Metcalfe, for the appellant. The conviction is wrong. On the construction of the agreement there is no reservation of game to the landlord. There is no express reservation of a right of entry, and from the words of the agreement no such reservation can be implied.

The Court then called upon

Lopes, Q.C. (*Bromley* with him), for the respondent. It is not necessary that the reservation of the right to kill game under this statute should be by deed. A parol reservation is sufficient: *Reg.* v. *Thurlstone* (1). The clause in the agreement amounts to a reservation within the meaning of s. 12. Under this section the occupier is bound to make out that the right belongs to him. It does not belong to the tenant, for he has stipulated that he will

(1) 1 E. & E. 502; 28 L. J. (M.C.) 106.

1871

COLEMAN v. BATHURST.

not kill game. There is, therefore, an implied reservation to the landlord.

COCKBURN, C.J. I do not think that the words in the agreement are sufficient to bring the case within the Act of Parliament. The agreement which prevents a tenant from killing game must be such that in the event of a breach of it an action will lie. Sect. 12 provides that the right of killing game upon any land must be specially reserved to the landlord. Now, this agreement stipulates that the tenant shall not kill or destroy game; but it does not reserve the right to kill the game to the landlord. The right is in abeyance; it is taken away from the tenant, but is not in the landlord. The agreement does not reserve a right of entry to the landlord, and without such reservation the landlord could not go on to the land for the purpose of killing the game. To bring the case within s. 12, something more is required than the mere denial of the right of the tenant to kill game. I confess I do not see any express or implied reservation, and therefore I think that the conviction must be quashed.

MELLOR, J. I am of the same opinion. The question we are asked is, whether, upon a true construction of the agreement, the game is reserved to the landlord. It is evident to my mind that the person who drew this agreement thought that the game belonged to the landlord, and made the tenant stipulate that he would not destroy it. I think that this agreement does not come within the statute. There is no right in the landlord to go upon the farm to kill game. To construe this clause as a reservation of game to the landlord would be to put a strained construction upon it.

LUSH, J. I regret that I cannot concur in the judgment of my Lord and my Brother Mellor, that there is no reservation of game to the landlord. By s. 12, where the right of killing the game upon any land is given by the Act to any landlord in exclusion of the right of the occupier of such land, or where such exclusive right has been specially reserved by or granted to the lessor, landlord, or any person other than the occupier of the land, then if the occupier of the land shall kill game upon such land, he shall be liable to

a penalty. Under what circumstances does the game belong to the landlord? We are referred back to s. 8, which enacts that "nothing shall authorize any person possessed of or holding any land to kill or take the game upon such land in any case where by deed, grant, lease, or any written or parol demise or contract, a right of entry upon such land for the purpose of killing or taking the game has been reserved or retained by, or given or allowed to, any grantor, lessor, or other person." The language of this section shews that the word "reservation" is not used in a technical sense; it points to an arrangement between landlord and tenant; and the game might be reserved by lease, by deed, or by parol contract. We are to look at the agreement, and see what the parties really meant—whether they meant the landlord or the tenant to have the right to kill the game. The tenant binds himself that he will not destroy any game, or keep any hound or other dog destructive thereof, and will forbid any person hunting, shooting, coursing, fishing, or trespassing on the farm, and will preserve all game bred and being there. It is true the agreement does not go on to say that he will preserve the game for the benefit of the landlord, in words; but it is necessarily implied, for there is no reason why the tenant should not agree to kill game unless it belongs to the landlord. If so, the agreement is within the words of s. 8, and the conviction is good.

Judgment for the appellant.

Attorneys for appellant: *Taylor, Hoare, & Taylor.*
Attorneys for respondent: *Gregory, Rowcliffes, & Rawle.*

1871
May 5.

MARSHALL, Appellant; FOX, Respondent.

Beerhouse—Habitual Criminals Act (32 & 33 *Vict. c.* 99), *s.* 10—*Knowingly suffering Thieves to meet and assemble in Beerhouse.*

By 32 & 33 Vict. c. 99, s. 10, a penalty is imposed on "every person who occupies or keeps any place where exciseable liquors are sold, and knowingly lodges or harbours thieves or reputed thieves, or knowingly permits or suffers them to meet or assemble therein."

The appellant, who occupied a place where exciseable liquors were sold, allowed a meeting to be held there for the purpose of getting up a subscription in aid of the wife and children of a man charged with an offence, or for procuring means for his defence. At the meeting were several thieves, or reputed thieves, who were known by the appellant to be such; but no disorderly conduct occurred, and the meeting was not held pursuant to any unlawful design:—

Held, that such an assemblage is forbidden by the section, inasmuch as it affords opportunity and inducement to devise crimes; and that the appellant was guilty of an offence within the meaning of the section.

Case stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

The appellant was convicted under s. 10 (1) of 32 & 33 Vict. c. 99, for that he, being a person who occupied and kept a place where exciseable liquors were sold, did knowingly harbour thieves, or reputed thieves, and did knowingly permit and suffer them to meet and assemble therein.

It was proved that there was held at the alehouse of the appellant what is called a "friendly meeting," or "lead," for the purpose of getting up a subscription in aid of the wife and children of a man who had been committed to take his trial for an offence, or for procuring him means for his defence. The manner in which the money was collected was by cards of admission, circulated by the friends of the parties to be benefited. In the large room of the alehouse the company sat round a table, drinking and singing songs, and among the company were several thieves, or reputed thieves, whom the appellant knew to be such. There was no disorderly conduct proved.

(1) By 32 & 33 Vict. c. 99, s. 10, "Every person who occupies or keeps any lodging-house, beerhouse, public-house, or other place where exciseable liquors are sold, or place of public entertainment or public resort, and knowingly lodges or harbours thieves, or reputed thieves, or knowingly permits or suffers them to meet or assemble therein," is liable to a penalty not exceeding 10*l*.

1871

MARSHALL v. FOX.

The magistrate, on this evidence, decided that there was such an assemblage as was within the meaning of s. 10, though he was of opinion that the parties were not assembled in pursuance of any absolutely unlawful design, or that they met together to concert crimes or otherwise to misbehave themselves.

It was contended on behalf of the appellant, relying on the opinion of the judges in *Greig* v. *Bendeno* (1), and in *Belasco* v. *Hannant* (2), that there ought to be no conviction; that the discretion of a magistrate should be exercised in the same spirit under the Act and section in question as is laid down by the judges in the cases referred to.

The question for the opinion of the Court was, whether the magistrate, upon the facts stated, was bound to convict.

May 3. *Francis*, for the appellant. The magistrate was not bound to convict; he had a discretion, on considering all the facts proved before him, whether he would or would not convict. He ought not to have convicted. The title of the Act is, "An Act for the more effectual Prevention of Crime," and the object is to prevent meetings of thieves for the purpose of concerting crimes. The persons did not assemble in the capacity of thieves—they assembled for a purpose not unlawful in itself—and if the meeting is for an innocent purpose, the magistrate is not bound to convict. If this section is to be construed strictly, persons situated as those were who assembled at this beerhouse, could never casually assemble to get refreshment. There has been no such meeting of thieves as to bring this case within s. 10, consistently with the decided cases. Sections in other Acts, somewhat similar to the one under discussion, have received a liberal construction; and unless thieves or prostitutes have assembled at a public-house for the purpose of concerting crime or carrying on their vocation, it has been held they ought not to be convicted: *Greig* v. *Bendeno* (1); *Belasco* v. *Hannant*. (2)

F. M. White, for the respondent. A congregation of thieves, or reputed thieves, for whatever purpose, is prohibited by s. 10; the offence does not depend upon whether the purpose for which the

(1) E. B. & E. 133; 27 L. J. (M.C.) 294. 4 Jur. N. S. 576

(2) 3 B. & S. 13; 31 L. J. (M.C.) 225. 8 Jur. N. S. 1226

1871

MARSHALL v. FOX.

thieves assemble is innocent or guilty: the magistrate therefore ought to have convicted. The thieves did not go to the public-house for refreshment; they went by invitation, and the inference is that they must have been assembled for some considerable time. The language of s. 10 is plain, and as the object of the whole statute is to prevent the assembling of thieves, the magistrate was right.

Francis, in reply.

[HANNEN, J. If it were not for the way in which the question is put—Is the magistrate *bound* to convict?—I should have no doubt upon the case. Under the circumstances stated in the case, I should not myself have had the slightest hesitation in convicting.]

Cur. adv. vult.

May 5. The judgment of the Court (MELLOR and HANNEN, JJ.) was delivered by

MELLOR, J. We have considered the question reserved for us, and cannot help thinking that what the magistrate intended to ask us was, whether, upon all the facts which he stated, we were of opinion that he was at liberty to hold otherwise than he did hold. He uses the word "bound," and we think he means that he considered himself *bound* to convict. We think he ought to have convicted on the facts stated, and therefore was bound. The statute, by s. 10, enacts that "every person who occupies or keeps any lodging-house, beerhouse, public-house, or other place where exciseable liquors are sold, or place of public entertainment or public resort, and knowingly lodges or harbours thieves or reputed thieves, or knowingly permits or suffers them to meet or assemble therein," shall be liable to a penalty.

In this case, the occasion of the assembling was that some man having got into trouble through a criminal offence, cards were sent out to his friends inviting them to meet, that funds might be procured for his defence; and consequently a number of persons assembled, and were found in this house sitting round a table singing songs and drinking. Clearly therefore they, being reputed thieves, did assemble there; in the terms of the section, "they did meet and assemble in his house." It appears that a number

1871

MARSHALL v. FOX.

of the persons were thieves and reputed thieves, and it is found as a fact that the landlord knew they were thieves or reputed thieves. Now it is not every casual meeting of thieves, or reputed thieves, who might accidentally come together, which constitutes an offence for which the landlord is made liable—it would be hard upon him if it were so; but we think that the intention of the legislature was to prohibit the meeting of thieves together in a public-house, though they might have no improper object in meeting, and for this reason, viz., that when thieves get together, it affords opportunity and inducement to devise crimes and offences. We think the magistrate ought to have convicted, and that is the only meaning we can put on the words "*bound* to convict;" and therefore we affirm the conviction.

Conviction affirmed.

Attorneys for appellant: *Hicklin & Washington.*
Attorneys for respondent: *Ellis & Ellis.*

DUTTON, APPELLANT; ATKINS, RESPONDENT.

May 9.

Vaccination Act, 1867 (30 & 31 *Vict. c.* 84), *s.* 31—*Power of Justice to order Vaccination of Child, in the Absence of the Child.*

By 30 & 31 Vict. c. 84, s. 31, if the registrar or other officer has reason to believe a child under the age of fourteen within his district has not been vaccinated, nor had the smallpox, information may be laid before a justice, and he may summon the parent to appear before him with the child, at a certain time and place; and upon the appearance, if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated nor had the smallpox, he may, if he see fit, order the child to be vaccinated within a given time.

A parent having been summoned appeared before the justice, but refused to produce his child; the justice was satisfied upon the evidence given that the child was under two years old, and had not been vaccinated:—

Held, that the production of the child was not a condition precedent to the justice's power to make an order for it to be vaccinated.

CASE stated under 20 & 21 Vict. c. 43, by the stipendiary justice for the borough of Wolverhampton.

The respondent was summoned by the appellant under the

1871

DUTTON v. ATKINS.

Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 31, to appear with his child, Lydia Atkins, before the justice on the 18th of January, 1871, to shew cause why an order should not be made directing his child to be vaccinated.

By 30 & 31 Vict. c. 84, s. 31: "If any registrar or officer appointed by the guardians to enforce the provisions of this Act shall give information in writing to a justice of the peace, that he has reason to believe that any child under the age of fourteen years, being within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded, the justice may summon such parent or person to appear with the child before him at a certain time and place; and upon the appearance, if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated, nor has already had the smallpox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been vaccinated, or shall not be shewn to be then unfit to be vaccinated, or to be insusceptible of vaccination, the person upon whom such an order shall have been made shall be proceeded against summarily; and, unless he can shew some reasonable ground for his omission to carry such order into effect, shall be liable to a penalty not exceeding 20s."

By s. 33 the statute 11 & 12 Vict. c. 43, except s. 11, shall apply to all proceedings under this Act.

The respondent (who had been previously convicted under ss. 16 and 29 of the Vaccination Act) appeared to the summons on the 18th of January, 1871, and refused to produce his child unless compelled by law to do so. After several adjournments the case was heard on the 22nd of February, 1871, in the presence of the respondent, who appeared without his child.

The justice was satisfied on the evidence given before him, and he found that the child was about a year and eleven months old, and had not been vaccinated nor had the smallpox.

For the respondent it was contended that, under s. 31 of the Vaccination Act, 1867, the justice had no jurisdiction to make an

order for the vaccination of the child unless she was present; that the justice had no power to compel the production of the child, or to enforce the appearance of a child of her age, or to proceed ex parte under 11 & 12 Vict. c. 43, s. 2, to the hearing of the complaint against the respondent, as though he was a party failing to appear to his summons, as in fact he had appeared.

The justice had doubt on the matter, but he was of opinion that s. 31 of the Vaccination Act, 1867, could not be construed as merely directory; but that the section, in providing specially for the appearance of the child, gives jurisdiction to the justice to make an order only upon the appearance of the parent or person having the custody of the child with the child before him, and after such examination as he (upon the appearance) shall deem necessary, and that he had no jurisdiction upon the appearance of the respondent without the child, and in the absence of the child, to make the order for her vaccination.

He was also of opinion that he had no power to compel the respondent to produce the child, or to enforce the appearance of a child so young; and that it was very doubtful (even if the construction put by him on the principal Act is wrong) if he could proceed ex parte to the hearing of the complaint, as the words of 11 & 12 Vict. c. 43, s. 2, which gives power to the justices to proceed ex parte, seems to give that power only in cases where the defendant does not personally appear. He therefore declined to make the order.

The question for the opinion of the Court was, whether the justice was right in point of law in declining to make the order asked for.

Griffits, for the appellant. Jervis' Act (11 & 12 Vict. c. 43) is, by s. 33, made to apply to the Vaccination Act, and by s. 2 of Jervis' Act a magistrate is empowered to proceed, on proof of service of the summons, if the party summoned fail to appear. It may therefore be doubtful, as the respondent personally appeared, whether this section would have enabled the magistrate to proceed ex parte. But it cannot be a condition precedent to the magistrate's power to make an order that the child should be produced; otherwise it would always be in the power of a parent, by refusing

1871

DUTTON v. ATKINS.

to bring the child, to defeat the statute, inasmuch as there is no means of enforcing the production of the children.

The respondent did not appear.

BLACKBURN, J. The meaning of the Act seems to be this. In the first instance, the parent is to be summoned, and he is to be directed to bring the child with him; but it cannot be a condition precedent to the magistrate's jurisdiction to make an order that the child is brought, otherwise the absurdity would follow, that by appearing without the child the parent might always defeat the operation of the statute. If the child is brought the examination of the child might be sufficient, but evidence would probably have to be taken; and if, without examination of the child, the magistrate is satisfied, after examination of evidence, that the child has not been vaccinated, he may, if he thinks fit, make an order. The ground of the magistrate's refusal in the present case is therefore invalid, and he will probably make the order on hearing our opinion.

MELLOR, J. I am of the same opinion. A summons is to issue to the parent to appear with the child, and it may be very desirable that the child should be produced, as the best evidence for deciding the matter; but if the parent refuses to produce it, it is not to be supposed that that is to obstruct the operation of the Act, and prevent the magistrate from proceeding and making an order, if, after examination of the evidence, he find that the child has not been vaccinated. I cannot say that there is not some ground for the difficulty which the magistrate felt; but I cannot agree with what he seems to have thought, that "appearance" means appearance with the child, or that the examination is confined to an examination of the child. The case must therefore go back, and no doubt the magistrate will make the order which he ought to have made.

Case remitted accordingly.

Attorneys for appellant: *Neal & Philpot.*

[IN THE EXCHEQUER CHAMBER.]

1871
May 11.

BRIDGES *v.* THE NORTH LONDON RAILWAY COMPANY.

Railway Company—Negligence—Contributory Negligence—Invitation to alight.

In an action against the defendants by the executrix of B. to recover damages for his death, alleged to have been caused by the defendants' negligence, the following evidence was given on behalf of the plaintiff:

B. was a passenger by the defendants' railway from London to Highbury. He was a season-ticket holder, and travelled to and fro every day; he was very short-sighted. The train consisted of six carriages; B. rode in the middle compartment of the last carriage. On approaching Highbury Station from London the railway passes through a tunnel. At the farther end of the station is a broad platform, far exceeding the length of the train; then a narrow platform, about 12 feet of which is within the tunnel; then a slope of 10 feet from the platform to the level of the rails; and beyond this a heap of hard rubbish extending some way into the tunnel, about a foot lower than the platform. The train stopped at the station, the last two carriages being still in the tunnel, and the carriage in which B. rode being opposite the heap. A passenger who rode in the next carriage, as the train stopped, heard "Highbury" called out at the far end of the platform; he got out, and then heard a groan in the tunnel; and on going back he found B. lying on the heap with his legs between the wheels of the carriage, but they had not passed over him. The passenger also heard "Keep your seats" called out, and the train then moved farther forward towards the platform. One of B.'s legs was broken, and he had received internal injuries of which he died. It was after dark; there was a lamp within the tunnel near the entrance, about 28 feet from where B. was found; the tunnel was full of steam.

The judge nonsuited the plaintiff, giving her leave to move to enter a verdict, "if the Court considered there was any evidence of negligence on the part of the defendants which could properly be left to the jury." The Court of Queen's Bench refused a rule. On appeal:—

Held, by Bramwell, Channell, Pigott, and Cleasby, BB., that there was not evidence on which a jury could properly have found for the plaintiff, and the nonsuit was therefore right.

By the same judges, that the question of whether there was contributory negligence on the part of the deceased was open on the above reservation.

By Kelly, C.B., Willes, and Keating, JJ., contrà on both points.

By the whole Court, that the calling out the name of the station is not in itself an invitation to the passengers to alight; whether it is so or not must depend on the circumstances of each particular case.

Rev'd 6 H.L. 207 H.L. 213.

APPEAL by plaintiff against the decision of the Court of Queen's Bench, refusing a rule to set aside a nonsuit and enter a verdict for plaintiff, pursuant to leave reserved at the trial.

Declaration by plaintiff as executrix and wife of R. H. Bridges,

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

deceased, for that defendants were carriers of passengers by railway from Broad Street Station to Highbury Station for reward, and the deceased was received by them to be so carried as a passenger; yet defendants did not use due and proper care in carrying the deceased, but so negligently conducted themselves that deceased, whilst getting out of the carriage in which he had been carried, was thrown down upon the ground, and received injuries whereof he afterwards died.

Plea: not guilty. Issue thereon.

The trial took place before Blackburn, J., at the sittings in Middlesex after Michaelmas Term, 1869.

The defendants are the owners and have the management of a line of railway from Broad Street to Highbury.

The deceased was about fifty-two years of age, and very short-sighted, and at the time of the accident was living close to the defendants' station at Highbury. He was a season-ticket holder between Highbury and Broad Street, and was in the habit of going up in the morning and returning in the evening daily from Highbury to Broad Street and back.

On the night of the 20th of January, 1869, the deceased left Broad Street at 6.40 P.M., in a train consisting of five or six carriages. He was in the second or third compartment, or about the middle of the last carriage, which was a second-class carriage, the guard's compartment being the last compartment. The train arrived at Highbury a few minutes before seven o'clock.

The station at Highbury is constructed as follows:—Approaching the station from Broad Street, you enter a tunnel of about 150 feet in length; there is a slope, and at the end of the slope, a quantity of hard rubbish, on the night in question, lay within the tunnel. The station is lighted; a lamp is placed at the mouth of the tunnel, but more under it (sic). (1)

The train, having entered the tunnel, stopped whilst two of the carriages were inside the tunnel.

A passenger who was in the last carriage but one gave evidence that he heard "Highbury" called out at the far end of the plat-

(1) This was the statement in the case, but it is misleading; the heap of rubbish in the tunnel was nearer to London than the slope. See the details at the end of the case.

form. He got out, and after he had got out he heard a warning, "Keep your seats," after which the train moved on towards the station. The witness, hearing a groan, proceeded farther back into the tunnel, and found the deceased lying with his legs across the rails between the wheels of the carriage, and his body on the rubbish. The wheels had not touched his legs or body. He was lying about ten feet from the end of the slope, and farther within the tunnel. He was found to have broken his leg in attempting to alight, and to have received mortal internal injuries by his fall. The tunnel was filled with steam, the night being damp.

It was admitted that death ensued from the injuries sustained through the accident.

The learned judge nonsuited the plaintiff; but, owing to a strong expression of opinion by the jury, the judge reserved leave to the plaintiff to enter a verdict, if the Court considered there was any evidence of negligence on the part of the defendants which could be properly left to the jury; and took the opinion of the jury as to the amount of damages, which they assessed at 1200*l.*

On the 24th of January, 1870, the plaintiff, in pursuance of the above leave, applied for a rule, but the Court of Queen's Bench (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.) refused it. (1)

Liberty was given to the Court to draw any inference, or find any facts, from the above facts and the plans annexed.

The following details appeared on the plans:—There is at the Highbury Station, beginning at the end farthest from Broad Street, a platform from 280 to 300 feet long and 11 feet broad; then a narrow platform, 2 feet 11 inches broad and 32 feet long, and of this narrow platform about 12 feet are within the tunnel; there is then a slope, not quite as wide as the platform, 10 feet long, from the platform to the level of the rails, the height of the platform above the rails being 2½ feet. At the end of the slope, and lying a foot or so on it, was the heap of rubbish, the average height of the heap being 16 inches, the height at the spot where the deceased was lying being 18 inches; the average width was 2 feet, and it extended 50 feet into the tunnel, the length of the tunnel being 150 feet.

The lamp in the tunnel was between 4 and 5 feet from the

(1) See Law Rep. 5 C. P. 459, n. (1).

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

entrance, and 27 feet 11 inches from the spot where the deceased was found. The next lamp on the platform was between 27 and 28 feet from this lamp.

The length of the train was about 180 feet; and when it stopped, the last carriage and half the next, or about 38 feet of the train, were within the tunnel, a carriage being about 23 feet long.

Nov. 29, 1870. *H. James, Q.C.* (*Kemp* with him), for the plaintiff, referred to *Foy* v. *London and Brighton Ry. Co.* (1); *Siner* v. *Great Western Ry. Co.* (2); *Cockle* v. *London and Brighton Ry. Co.* (3); *Praeger* v. *Bristol and Exeter Ry. Co.* (4); *Petty* v. *Great Western Ry. Co.* (5); *Whittaker* v. *Manchester and Sheffield Ry. Co.* (6); *Plant* v. *Midland Ry. Co.* (7); and *Harrold* v. *Great Western Ry. Co.* (8)

Sir J. B. Karslake, Q.C. (*Aspinall, Q.C.*, and *Shield* with him), for the defendants, referred to *Toomey* v. *London and Brighton Ry. Co.* (9); *Cornman* v. *Eastern Counties Ry. Co.* (10); and *Crafter* v. *Metropolitan Ry. Co.* (11)

H. James, Q.C., in reply.

Cur. adv. vult.

May 11. The following judgments were delivered:—

CLEASBY, B. In this case the deceased was a season-ticket holder of the defendants, and in the habit of travelling daily from Highbury Station to London and back. On the night in question, the 20th of January, 1869, he was a passenger by the train leaving London at 6.40. There were several carriages in the train and the deceased was a second-class traveller in the last carriage.

There is a tunnel of about 150 feet in length as you approach the station, and within the tunnel there is a slope of about ten feet in length leading up to the level of the platform. In the tunnel, from the bottom of the slope, there was at the side of the railway for some distance a quantity of hard rubbish.

On the occasion in question, when the train stopped there were,

(1) 18 C. B. (N.S.) 225.
(2) Law Rep. 4 Ex. 117.
(3) Law Rep. 5 C. P. 457.
(4) Law Rep. 5 C. P. 460, n. (1).
(5) Law Rep. 5 C. P. 461, n. (1).
(6) Law Rep. 5 C. P. 464, n. (3).
(7) 21 L. T. (N.S.) 836.
(8) 14 L. T. (N.S.) 440.
(9) 3 C. B. (N.S.) 146; 27 L. J. (C.P.) 39.
(10) 4 H. & N. 781; 29 L. J. (Ex.) 94.
(11) Law Rep. 1 C. P. 300. 12 Jur N.S. 27

(10 Sc 5 Jur N.S. 657.

according to the statement in the case, two carriages within the tunnel, and as the length of two carriages appears by the defendants' plan to be about fifty feet, the deceased must have been between thirty and forty feet within the tunnel. According to the statement of one of the witnesses (a passenger), when the train stopped he heard "Highbury" called at the far end of the station, and got out, and after he got out, heard a warning, "Keep your seats," and the train moved a short distance on. In the meantime the deceased had endeavoured to get out, and in getting out fell upon the rubbish, and received such injuries that he died.

There is another fact stated in the case, viz., that the deceased was found in a certain position. But this is so defectively stated as regards time that no reliable inference can be drawn from it. If carefully examined, it will, I believe, be found to be quite consistent with the statement already made; supposing it, however, to be ambiguous, then it cannot vary the facts which do clearly appear, and the case must be considered upon these facts; and upon them alone it was argued before us and in the court below.

Upon the state of facts described, Blackburn, J., before whom the case was tried, thought there was no evidence of the defendants' liability which could properly be left to the jury, and directed a nonsuit. He reserved leave for the plaintiff to move to enter a verdict if there was such evidence.

A motion was made in the Queen's Bench, and a rule refused, and upon this refusal the present appeal has been brought.

I am of opinion that the learned judge properly directed a nonsuit, and that the present appeal should be dismissed.

In the present case the immediate cause of the injury was not any act or omission of the defendants, but the act of the deceased himself, in getting out of the carriage when he did. But the plaintiff alleges that the defendants are responsible for this, because it was really attributable to some breach of duty on their part. This makes it properly a question for the Court, at least to some extent, to determine whether there is any evidence of such liability. It must be for the Court to say what are the duties arising out of the position of the railway company, and the contract for carrying passengers entered into; though the breach may involve a question on which the finding of the jury ought to be

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

taken. As a general rule, a railway company inviting the public to travel by their line is bound to provide means of access to, and egress from, their carriages and station, which can be used without danger. This might be subject to the qualification (not applicable to the present case), that though access into some particular station might be, from its peculiar position, inconvenient, or even dangerous, yet a passenger having full knowledge of its being so, and still choosing to use it, might not have any ground of complaint: volenti non fit injuria. But no complaint was made in this case of the condition of the station itself, which had been regularly used by the public and the deceased for a considerable time.

The defendants are also under an obligation to use due and reasonable care in all matters connected with the carrying of passengers. In the present case the train appears to have stopped when a portion of it had not reached the platform. But this cannot always be avoided, and is not therefore of itself a negligent management of the train, and the learned counsel for the plaintiff did not rely upon it as such. But it appeared that when the train stopped the servant of the company at the station called out "Highbury," the name of the station (part of the train only being opposite the platform), and upon this reliance was placed on the part of the plaintiff. It was said to be an invitation by the company to alight, and that, being given before the whole train was at the platform, and while a part of it was at a place dangerous for alighting, this amounted to neglect of duty, or was sufficient evidence of it to justify a verdict for the plaintiff.

When leave is reserved to enter a verdict for the plaintiff (as in the present case), the arrangement is a beneficial one to the plaintiff, by avoiding the necessity for a new trial; and it is well settled that in such a case the question is not whether there was a scintilla of evidence, but any such reasonable evidence as would, in the judgment of the Court, justify a verdict for the plaintiff.

Many cases were referred to as to the effect to be given to the trains stopping when a part only was opposite the platform, and also to the name of the station being called out: *Siner* v. *Great Western Ry. Co.* (1); *Cockle* v. *London and South Eastern Ry. Co.* (2) (in which the cases are collected); and two cases, *Praeger* v. *Bristol*

(1) Law Rep. 4 Ex. 117. (2) Law Rep. 5 C. P. 457.

and Exeter Ry. Co. and *Petty* v. *Great Western Ry. Co.*, referred to in the note to that case. (1)

In some of these cases an element is introduced which may make a material difference in the decision, viz., that the station was so constructed as, when the train stopped, to deceive the passenger, and make him suppose he was at the platform when in reality he was not. It could hardly be contended that the deceased, who stopped at this station regularly night and morning, mistook the rubbish, or anything else thirty feet within the tunnel, for a platform; and therefore the element referred to is wholly wanting in the present case. It was suggested to exist in the case of *Petty* v. *Great Western Ry. Co.* (1), and the case went to a new trial to ascertain if it did exist. Without that additional fact, the case was substantially the same as the present one, and the decision was that without that fact there was not sufficient evidence of negligence to submit to the jury. But though this decision is most nearly in point, it does not appear to have been unanimous; and the other cases bear upon the same question; and the opinion of the judges vary considerably; so that the effect of calling out the name of the station is a question on which an independent judgment in a court of error may properly be exercised.

I cannot agree in the propriety of regarding the calling out the name of the station as of itself an invitation by the company to the passengers in the train to alight. It appears to me to be giving to an act of the porter a character which does not properly belong to it, and to confound two distinct things, viz., inviting the passengers to do a thing, and giving them information upon which they may determine to do it. The calling out the name of the station is not an act upon which such a person as the porter is to exercise a discretion whether he will do it or not. But just as there is a large board giving the name of the station, so (as the board may not be seen) the porter, when the train stops, calls out the name of the station for the information of the passengers. It is not only information to those whose destination is the particular station that they have arrived at the end of their journey, but equally so to those whose destination is farther on, that they have farther to go. In reality, the stopping of the train at the station

(1) Law Rep. 5 C. P., at pp. 460, 461, n.

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

is the invitation to the passengers to alight; for the passengers have then a right to expect that they can alight without danger, at the proper place for alighting. The announcement of the fact that the station arrived at is Highbury is no further invitation than the arrival itself. The passengers who are acquainted with the line, and know the stations, do not wait for the announcement and are not influenced by it.

It is stated in the case that the deceased was very short-sighted, but this additional fact cannot make negligence in the company, if there is not negligence without it.

The ground of the judgment of the Queen's Bench in the present case, as appears from the report of the case given in the note to *Cockle* v. *London and South Eastern Ry. Co.* (1), was that the calling out the name of the station did not justify the deceased in getting out; and from what has already been said it appears that I agree in the conclusion arrived at, and also in the reasons given.

But I think it right to add that even supposing there is sufficient evidence of negligence of the defendants to be submitted to a jury, I am entitled to consider all the evidence relating to the conduct of the deceased as well as of the defendants, in considering whether there was a proper case to be submitted to a jury: as was done in *Siner* v. *Great Western Ry. Co.* (in error) (2), and other cases. Now, in the present case, it is undisputed that the act of the deceased not only contributed to, but directly caused the damage. Can there be any doubt, upon the admitted facts of the case, that the act was an improper one? He was a season-ticket holder and in the habit of using the station night and morning. He knew, therefore, that there was a proper lighted platform at the end of the tunnel, and he chose to get out in the tunnel and in the darkness (which caused the accident) at the distance of about thirty or forty feet from the mouth of the tunnel. As there was no light nearer than the mouth of the tunnel, he must have known from the darkness that he was at a considerable distance from the mouth of the tunnel. If, therefore, he got out when he did, either from being in a hurry or from groundless fear of being carried on, it was improper to do so in the tunnel and in the dark, and the plaintiff cannot recover. If he got out after the train had begun

(1) Law Rep. 5 C. P., at p. 460. (2) Law Rep. 4 Ex. 117.

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

to move a second time, then obviously his doing so was improper, and the plaintiff cannot recover. The fact of the deceased being short-sighted may have prevented him from seeing the rubbish, but it was not the less improper for him to get out where he did.

The above grounds seem clearly to warrant the conclusion that there was contributory negligence in the deceased, independent of authority, and it is unnecessary to refer to the case of *Siner* v. *Great Western Ry. Co.* (in error) (1), where the facts leading to that conclusion were not so strong, and the Court arrived at the same result.

It certainly appears to me that, from the facts and evidence stated, it would be unreasonable to conclude that the injury was caused by the negligence of the defendants; and that it would be equally unreasonable to conclude that it was not caused by the negligence of the deceased; and therefore the appeal must be dismissed.

PIGOTT, B. I have not been free from doubt in this case; but, after much consideration, I have come to the conclusion that the nonsuit was right.

The question is, whether there was evidence in the case on which a jury could properly find that Mr. Bridges came to his death by the negligence or improper conduct of the defendants' servants. If there was not, the judge was bound to withdraw the case from them. The evidence was that Mr. Bridges, who was a short-sighted person, held a season ticket between London and Highbury, and was in the daily habit of travelling between these two places backwards and forwards. On the night of the accident he was riding in the last carriage of the train. The train was stopped short of the Highbury Station by the length of the last two carriages, and the effect of that was, that these carriages were within a tunnel which it seems is closely adjoining to the main portion of the Highbury Station, and encloses one end or a very narrow part of it. While the train was in this position a witness got out of the last carriage but one, having heard the name of the station "Highbury" called out at the opposite end of the platform before he got out: and when he was out he heard "Keep your seats" also called out. This witness heard a groan, which proceeded

(1) Law Rep. 4 Ex. 117.

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

from the deceased, who was found by the witness lying on a heap of hard rubbish which was within the tunnel, and at the end of the slope of the platform, but the deceased was about ten feet from the slope end and further in the tunnel. The tunnel was filled with steam. It is not very certain what the state of the light was at the point where Mr. Bridges' carriage stood. The evidence was that the platform was lighted, and that there is a lamp at the mouth of the tunnel, and more in it; whence I infer there was not a want of light. The deceased was found to have sustained injuries by his fall, of which he died. The train was afterwards moved on to the station.

It was argued that this evidence shewed negligence in the company, and principally in two respects:—first, in stopping the train short of the platform; and secondly, in calling out the name of the station while part of the train was in the tunnel.

I am of opinion, however, that whether these two circumstances be regarded separately or together, they do not afford any proof of negligence. The stopping of the train might have been intentional or accidental; that is to say, the driver might have had good reason for bringing it to a stop because of some signal or object in the way, in which case the act would have been right and proper; or it might have been accidental, because of the exact distance not being accurately measured when the driver shut off the steam so as to bring up the train. This sometimes occurs, and must occur in practice with the most skilful drivers without involving the smallest degree of negligence or bad driving; nor was the stoppage in that place calculated to have the least effect on the passengers who were not and could not be required to alight, except at the regular platform. There is, in fact, nothing to shew that the defendants intended the passengers to alight in that place, or did anything which was calculated to mislead the deceased or any one else. And I think that may be said whether the deceased heard or did not hear the call out "Highbury."

This brings me to consider what is the true meaning to be attached to the calling out the station. What do the company mean by it, and the passengers understand? It was argued that it is in itself an invitation to the passengers to alight, or that, at all events, it was evidence for the jury of an invitation, and

as it was then dangerous to get out it was improper at such a time to give the invitation. I think, however, that is not a true view. In practice every one must be aware that the name of a station is called out as the train passes along into the station. Those who hear it know that the train is in motion, and no one who thus attempted to get out and received an injury in so doing could pretend that the blame did not rest with himself. The call out cannot be intended to supersede the necessity of each passenger seeing to his own safety in descending from a carriage, and it no more means it to be implied that every carriage is at the platform than it does that the particular platform is on the ordinary and most usual side of the train. The object intended and accomplished by it is to give notice to the passengers of the name of the particular station at which the train is arriving, or has arrived, as the case may be, so that each one may know whether it is the place to which he is destined. It is, in fact, only another but more effectual notice in addition to the writing-up in the station of the name of the place, which may not or perhaps cannot be read by all. Suppose the name of a landing-place be called out on the river steamers as they approach it, no passenger would think of stepping from the vessel without seeing for himself whether he could safely reach the shore; and if its meaning would be so understood there, why is it to have a different meaning applied to it on railways? The circumstance of the carriages being in a tunnel, and by night instead of by day, seems to me only to throw on the passenger the more blame for leaving the carriage when and where he could not see the properly lighted platform, or could see that he was not at any platform.

It is suggested that Mr. Bridges may have mistaken (through defect of sight) the place where he fell for the platform. It is true that he may; and this is the only point in the case which has created any doubt in my mind. But it is mere speculation; for there is not the slightest evidence that he did so. The witness who got out of the next carriage does not pretend that he got out by mistake, and he was, I infer, in a similar position to the deceased; nor is there any evidence from this or any other witness to prove that there was a probability of such a mistake, or that it was from any circumstance of light, or appearance, or otherwise,

1871

Bridges v. North London Railway Co.

calculated to be so mistaken. But even if this hypothesis were correct, how can a railway company be required to adopt a different practice towards persons who, unknown to them, happen to be short-sighted, or actually *blind*, from what they observe towards all the public?

It is unfortunately a matter of every day's observation that passengers do not wait for an invitation to get out, or for the train to stop: and if I were at liberty to import the general practice into this case, I should think it more likely that the deceased, like the witness, got out with a full knowledge that the train was not at the platform: and that, being a short-sighted person, he either was not aware that the drop from the carriage was so great as it proved, or that the heap of rubbish was in that place, and over which he may have fallen after he reached the ground. It is not, however, necessary for me to resort to any such ground of decision; my judgment is based upon this, that the two circumstances, viz., stopping short of the station and calling out the name of the place do not, either separately or taken together, afford any reasonable evidence of negligence or improper conduct on the part of the railway company's servants; and there is nothing else in the case from which any inference of negligence can be drawn or suggested.

8 Q B 184

The conclusion at which I have arrived is that, whether Mr. Bridges brought this misfortune upon himself by contributory negligence in descending from the carriage at an improper place, or whether he sustained his injury from some accidental circumstance of falling over the rubbish after he had reached the ground, there is no negligence on the part of the railway company's servants to which it is shewn to have been due, by any reasonable evidence: and therefore the judgment of the Queen's Bench ought to be affirmed.

KEATING, J. I am of opinion that there was evidence which ought to have been left to the jury, and therefore I think that the judgment of the Court below ought to be reversed. I think it is important to observe what is stated in the case with reference to the formation of the platform where the accident occurred. It appears to have been a very long platform, extending within the

adjoining tunnel; and beyond that portion of the platform so extending into the tunnel there was a slope by which the platform was approached from within the tunnel; beyond that slope, again, there was a heap of rubbish, as to which, and why it was there, no evidence whatever appears to have been given.

Now, that being the state of the platform, the train on the day in question came up to the platform and stopped. At the time that it first stopped two carriages were within the tunnel, in one of which carriages the deceased man was, and that carriage was nearly opposite, if not exactly opposite, to the heap of rubbish. When the train stopped, or about the time it stopped, there was the call "Highbury." Now, I do not mean to say that the calling out the name of the place at which a train has arrived is an invitation always to the passengers to alight. It may be, or it may not be. Where the train has finally stopped, and the name of the station is called out, it would usually be accepted as an invitation, and indeed a direction, to get out, unless the passenger wished to be carried on. However, there was this calling out "Highbury" about the time that the train stopped. The deceased man, it would seem, accepted that as an invitation to alight. It is said that he was reckless and wrong in doing so. He certainly did not judge rightly on the occasion, and it may be that he ought reasonably to have formed a better judgment. But the question that is reserved for us upon this case is in these terms: "The learned judge nonsuited the plaintiff, but owing to a strong expression of opinion by the jury the judge reserved leave to the plaintiff to enter a verdict, if the Court considered there was any evidence of negligence on the part of the defendants which could properly be left to the jury." And therefore the question that I have considered here is, whether there was any evidence of negligence on the part of the defendants which ought properly to have been left to the jury. For it seems to me, if there was evidence of negligence on the part of the defendants which ought properly to have been left to the jury, that the question of contributory negligence would almost necessarily form a question which must be left to the jury. Of course, when I say evidence of negligence on the part of the defendants, I mean negligence conducing to the accident which has occurred.

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

Now, "Highbury" was called out on the stopping of the train, and the deceased man got out. Why did the train stop in the tunnel? I entirely agree that that may have been the result of accident; it may have been the result of the state of the station at the time which rendered it necessary; or, on the other hand, it may have been the result of negligence and unskilful driving. It must be remarked here that no explanation whatever was offered on the part of the defendants; and therefore, in judging whether the nonsuit should be upheld, we must take it that no satisfactory explanation could have been offered of it. Surely, if an explanation could have been offered, and was not offered, or even if it had been offered, it was for the jury to judge of the explanation which was or ought to have been so offered; and probably, if the nonsuit had not taken place, the company might have called witnesses for the purpose of explaining that which, primâ facie, looked very like negligence. For we know from experience that, usually, trains come up to the platform, and when they stop short of the platform—I mean of the ordinary part at which the train stops—there must be some unusual cause for it. Here by the nonsuit the defendants were precluded from shewing the cause; and if they had attempted to shew the cause, the jury must have judged of that cause so shewn. The question is, whether there was anything to call upon the defendants for an explanation. Surely, there were matters which decidedly required explanation. First, Why did the train stop where it did? Was it negligence and unskilfulness on the part of the driver, or was it the result of accident, or the state of the station, or some other justifiable cause that required explanation? Although the calling out of the station is not to be taken in all cases to be an invitation to descend, yet it is a statement by a servant of the company, as it seems to me, when the train stops, that the final stoppage has taken place; and that being so, the matter ought to have been explained. Here it did appear that another servant of the company called out afterwards, "Keep your seats." Unfortunately that was too late for the deceased man, because he seems to have acted on the first intimation of the calling out "Highbury" exactly as other passengers did, who, however, were more fortunate, and got out with safety. The call was "Keep

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

your seats." It may be that that might have reached the deceased in time to have obliged him in common prudence to keep his seat. That may have been so; and if in spite of that he left the carriage, that would be strong evidence of recklessness on his part. But who is to judge of that? Is the learned judge who presides to say, "I will not allow the jury to consider whether it was so or not"? There was nothing to explain it. Was there nothing to call on the defendants to give any explanation of the circumstances occasioning the death of this man? It appears to me that there was—I cannot say clearly, because the difference of opinion alone would prevent me entertaining a clear opinion upon it; but it seems to me from all these facts that there was evidence which ought not to have been withheld from the jury, and that the jury were justified in the strong opinion which they expressed on the occasion. That being my opinion, I think that the judgment of the Court below ought to be reversed.

CHANNELL, B. In this case I am of opinion that there was no evidence which ought to have been left to the jury in support of the plaintiff's case, and that the nonsuit was therefore right.

It is clear that in order to succeed the plaintiff had to give evidence that the death of the deceased was caused by the negligence of the defendants. There is no real exception to the rule that in these cases the burden of proof lies on the plaintiff. There may be cases of accidents the mere proof of which supplies the necessary evidence of negligence, for the nature of the accident may be such that it could not be caused otherwise than by the defendants' negligence. There, as has been said, res ipsa loquitur. The present is not such a case; for if the nature of an accident to a passenger in getting out of a train in a tunnel is of itself evidence of negligence on any one's part, it is on the part of the passenger, and not of the company. Again, there may be cases, as in *Scott* v. *London Dock Co.* (1), where it is shewn that the accident is such that its real cause may be the negligence of the defendant, and that whether it is so or not is within the knowledge of the defendant, and not within the knowledge of the plaintiff. In such cases the plaintiff may give the required evidence of

(1) 3 H. & C. 596; 34 L. J. (Ex.) 220.

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant. The present case does not come within that rule, for although possibly the plaintiff, the executrix, had no means of explaining how the deceased came to get out of the carriage, yet certainly the defendants had no better means. Assuming, therefore, that it lies upon the plaintiff to give reasonable evidence shewing that the cause of the injury to the deceased was negligence on the part of the defendants, I am of opinion that she has not done so. It appears that the death of the deceased was caused by his descent from the carriage in the tunnel, and not by any subsequent injury to him when the train went on. The place where he descended in the tunnel may be taken to be a dangerous place for any one to descend at; and undoubtedly it would be dangerous to any person getting out under the impression that there was a platform on the spot. If it were sufficient, therefore, for the plaintiff, in order to make a case, merely to give evidence of some negligence on the part of the defendants, it is possible that there would be such evidence; for the train being under the management of the defendants, it might be presumed, according to the principle of *Scott* v. *London Dock Co.* (1), that in the absence of explanation by the defendants, the stoppage of the train in a dangerous place was due to some carelessness on the part of the defendants' servants, and not to any inevitable accident.

It is not enough, however, merely to shew some negligence on the part of the defendants contemporaneous with the accident. In order to constitute a cause of action, the damage to the party complaining must be caused by the negligence of the defendants. Here the proximate cause of the damage was the act of the deceased in descending from the carriage where he did. This being a voluntary act on his part, the plaintiff can only recover on the ground that the deceased was reasonably induced by some negligence or improper conduct of the defendants to do what he did. Accordingly, the question which has been principally argued before us was, whether the calling out of the name of the station was an invi-

(1) 3 H. & C. 596; 34 L. J. (Ex.) 220.

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

tation to alight. As to this, I agree to what has been said in the most recent cases, that it depends upon the circumstances, and that in some cases it may be an invitation, and in some not. I do not think, however, that it can ever be an invitation to a passenger to shut his eyes and jump from the carriage in which he is, in the blind expectation of alighting on a platform of the usual construction. In the present case there were no other circumstances than the calling out of the name which could have induced the deceased to suppose he had arrived at a safe place to alight. It seems to me impossible, from the description of the station in the case, not to come to the conclusion that no person with ordinary faculties and using them could have supposed, in the deceased's position, that he had arrived at the proper place to alight. It is true that the case states that the deceased was very short-sighted, but on the other hand he was a season-ticket holder, travelling daily to this station, and knew it well. Under these circumstances it appears to me as clear as anything can be about which so little is known, that the deceased met his death either in consequence of his own recklessness in getting out of the carriage without looking about him, or in consequence of his infirmity of sight not enabling him to see what any one else would have seen. In the first of these two cases it is clear that the defendants would not be liable; in the second, I think they would not be: for the cause of the injury would not be the defendants' negligence, but the deceased's infirmity, against which the defendants would not be bound to guard. This latter case, however, if it had to be decided, might require further consideration. I prefer to base my judgment on the fact that the evidence is at least as consistent (though in my opinion it is really more consistent) with non-liability on the part of the defendants as with liability. We are left in entire ignorance whether the deceased got out before the name of the station was called out, or after it was called out, and before the call "Keep your seats," or whether he got out after both; whether he could see the danger and took his chance, or whether he could not; whether he saw anything which he took for the platform, or whether he trusted merely to the call. This being the case, and admitting that if some of those circumstances had been proved the defendants might have been liable, yet I think the plaintiff, not

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

giving any evidence by which these doubts could be solved, fails to make a case.

It has been argued, that although we may not think that a verdict for the plaintiff would have been right, yet that there was evidence that ought to have been left to the jury, and the judge was wrong in nonsuiting. I think, however, that the question whether a nonsuit is right is substantially the same in all cases where the burden of proof lies on the plaintiff, as the question whether a verdict found for the plaintiff should be set aside as against evidence. It is now settled in the case of *Ryder* v. *Wombwell*, in the Exchequer Chamber (1), and the authorities there quoted, that a mere scintilla of evidence ought not to be left to the jury. In the present case, I think there was no more than a scintilla of evidence, if so much, on the question whether the damage was caused by the negligence of the defendants.

I do not think that in all cases the question of contributory negligence must necessarily be left to the jury. It is true that in ordinary cases the plaintiff is not bound to negative contributory negligence, so that in such cases the defendant must prove the contributory negligence if it exists; yet if facts are disclosed on the plaintiff's case, the truth of which is not disputed, and which, if true, clearly shew that the plaintiff contributed to the accident, then the judge may nonsuit: not because he can take upon himself to find the contributory negligence proved, but because, in such a case, the plaintiff fails upon an issue which lies upon him, viz., the issue whether the damage is caused by the negligence of the defendants. Of course it may usually be a proper course for the judge to take the opinion of the jury, in order to save the expense of a second trial in case of his own opinion being overruled by the Court. In this case, however, that appears to have been done; and it is evident, from the case, that the jury would have found for the plaintiff. I think, however, that if they had been allowed to do so, their verdict ought to have been set aside as against the evidence, there being no evidence on which they could properly find for the plaintiff upon whom the burden of proof lay.

Under these circumstances, I think the nonsuit was right, and that the judgment of the Queen's Bench ought to be affirmed.

(1) Law Rep. 4 Ex. 32.

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

BRAMWELL, B. I see no difficulty in the statement in the case of the facts. The deceased was found with his legs between the wheels of the carriage, and it is not said that the wheels went over his legs, though the train moved on. It follows, then, that he was moved before the train so moved on. The supposed difficulty arises from treating the facts as stated in the order of time, whereas the narrative first mentions what happened to the train, and then what happened to the deceased; and this difficulty would vanish if the facts had been stated in their order, viz., first, the train stopped; then the witness got out; then heard a groan; then proceeded into the tunnel and found the deceased with his legs between the wheels; and then the train moved on. It seems to me we have a perfectly intelligible statement to proceed on.

The question arising on it is stated in the case to be, "Was there any evidence of negligence on the part of the defendants which could properly be left to the jury?" I suppose we may say, of negligence, or *other wrongful conduct*, and must add *which conduced to the accident*. I asked the learned counsel for the plaintiff what he said was the negligence or wrongful conduct. He said the calling out of "Highbury" before the whole of the train was at the platform. He did not say that it was negligent or wrong that the train stopped at first short of the platform, and, with great respect, properly did not say so. Because every one, I should have thought, knows that it is impossible, with the varying weight of trains, efficiency of break-power, and state of the rails owing to the weather, to be always certain of bringing the train to the precise spot desired. The negligence or wrong, then, according to the case made for the plaintiff was limited to the calling out of "Highbury" before the train finally stopped. If it was negligent or wrongful, it was so absolutely, and not contingently, on the train not stopping at the desired place. For if not negligent or wrongful at the time of calling out, it did not become so by a matter the caller-out could not foresee, viz., by the train not stopping at the right place. But if it was negligent or wrongful of the railway servants to call out "Highbury" in this case before the train stopped at the right place, so it is in all cases so to call out before the train so stops. And then according to my experience on all railways, at all stations throughout the kingdom, on the arrivals

1871

WILKES v. NORTH LONDON RAILWAY CO.

of all trains, negligence and wrong are committed. For, according to my experience, as soon as a train is near enough for the passengers to hear, the porters call out the name of the station at which it is about to stop, and continue to do so till and after it is stopped; and in my opinion, not only is it not negligent or wrongful for them to do so, but it would be wrong if they did not. For it is desirable that the earliest and amplest notice should be given of the station at which a train is arriving, in order that passengers may collect their parcels and umbrellas, and make preparations to get out, and may have the best chance of hearing the name of the station. And I think if a passenger were carried beyond his intended station, or injured in getting out, owing to there not being a calling out of the name of the station till the train stopped, whereby he could not get ready to get out, he would have great right to complain. If it should be said they ought not to call out till the train has stopped, and then ought to give everybody ample time to get out, then the whole public would have cause to complain of needless delay. It may be, however, that all the railway porters everywhere act wrongly. Let us examine why this calling out before the train stops is negligent or wrongful. It is said to be so because it is an invitation to get out, and by the hypothesis to get out when it is uncertain if the passenger ought to get out. Now, this word is an unfortunate word. It has, I think with all humility, given rise to error. The calling out is no invitation to get out. It is an announcement that the station at which the train will stop, is stopping, has stopped, is the station named. It is no more an invitation to get out than the name of the station painted upon the wall, especially when it is added, "Change carriages for" so-and-so. But if it is to be considered in any sense an invitation, is it more or less or other than an invitation to get out when the train stops at the platform? Is it prescribed that if the train stopped so that a passenger-carriage was just where the railway was over an arch, and where there was no parapet, that the calling out would be an invitation to the passenger to fling himself on to the road or stream below? Surely not; and why not, except that, if an invitation to get out at all, the calling out is an invitation to get out, *if the carriage stops at a fit place for getting out*? Suppose the door of the carriage stopped at a part of the platform where

there was a quantity of luggage ready to be loaded, would the passenger be invited to step out there, tumble over, and damage the articles and himself too? No. I think, therefore, there is no such invitation in calling out the name, and that in this case there was no negligence or wrong in so calling out. In this particular case it is to be observed that there is no evidence that the calling out was after the train first stopped and before it was called out "Keep your seats." It no doubt was the fact that the calling out of the name was while the train was in motion, and before it was not just at the platform. There is no direct evidence that the deceased heard the calling; but I suppose, as the passengers did in the next carriage to the deceased, there is in that way evidence that the deceased heard it. But assuming he heard it, is there any evidence to shew he attended to it or acted on it? He was a season-ticket holder, and travelled daily on the line. Does any one suppose he derived the least information, or was in the least guided by the name being called out? Does not every man perfectly well know his own station? The number of stations he has stopped at, and the name of the last station always tell him when he is arriving at his own. Is there any evidence, is there any reason or ground for supposing that the deceased was in the least degree influenced by the calling out of the name if he heard it? Is it not certain that when the train stopped at his station he concluded it had stopped at the platform, and, being very defective in sight, got out when he ought not to have done so? Does any one suppose this calamity would have happened to any one of ordinary power of sight? He was a considerable distance within the tunnel, where there were no lights, and when the least caution should have prevented him getting out if he had been possessed of ordinary powers of sight. Mr. James said, and truly enough, that if railways carry people with bad sight, they must make provision for them. I agree they must lay no snares for them into which they might fall, but which persons who could see well might avoid. Thus, if a person with bad sight fell over an obstruction on the platform, which a person seeing well would have seen and avoided, the person so falling would have a right to complain. But, on the other hand, a person with bad sight must run the risks of ordinary and unavoidable matters, or they must have some one to travel with and

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

take care of them. Here a thing, sometimes at least unavoidable, happened, viz., the train stopping short; a person of ordinary sight would have come to no harm, the deceased from his bad sight did. There is, therefore, wrong or negligence on his part. Either he could see enough to see this was not a proper place to get out at, or he could not. If he could, he ought not to have got out. If he could not, if his sight was so bad, he ought not to have travelled unattended. This also would disentitle him to recover. Indeed, I do not consider it a case of contributory negligence, but that it is all his. It is all his act. He does it himself under a mistake of his own making, not caused by the defendants. He reasoned, and concluded he had arrived at a place where he might safely get out. His conclusion was wrong. A man has no right to trust to his reasoning when he can use his eyes, and put a burthen on others because his reasoning was wrong. If it is said his eyes in this particular case would not inform him, that is his misfortune. Mr. James's remark may be retorted, "People with defective senses who choose to travel by railway must be content with accommodation sufficient for mankind in general, or take the consequences." Suppose a man wholly blind got into a train, must a special porter be in readiness for him?

But it is said the question was for the jury. I think not. The statement of the question in the case seems inaccurate. It is said that the verdict is to be entered for the plaintiff if there was "any evidence of negligence which could properly be left to the jury." But either calling out "Highbury" was negligent or wrongful, or it was not. It was an undoubted fact, and was not evidence of anything else. Evidence of a thing supposes two things, the evidence and the thing evidenced. If a train runs off the line, it is evidence of negligence, i.e., of some act of negligence which caused it to run off the line. So if a man is found with the produce of a burglary, and it is proved he left his house with housebreaking implements on him, both facts are evidence against him. The one, of the fact that he intended to commit burglary, and could; the other, that of the fact that he had committed it. But what further fact was to be found here by the jury? None. Either, therefore, it was for the judge to rule that the very act itself of calling out was or was not negligent or wrongful, or he should have left it

to the jury to say if it was. He ruled that it was for him to decide, and that it was not negligent or wrongful. If it was for him to decide, I think he has decided rightly. Then, was it for the judge or the jury? I say for the judge. Where the facts are certain, where there is no other material fact to be inferred from them, either as causing them or resulting from them, and the question is not one for experts, but for that common-sense which is common to all of us in a greater or less degree, the matter is for the judge. How otherwise could there be a special verdict? Might not the jury have found all the facts stated in the case, and left to the Court whether the calling out was negligent or wrongful? Let us put an extravagant case—not thereby meaning this is not—but a case so extravagant that no one could doubt. Let us suppose a plaintiff said he saw the guard wave his hand, and thought there was danger, and hurried out and got hurt; or saw a porter sitting down, and so thought he ought not to get out, and was carried on, would it have to be left to the jury to say if such things were negligent? In this case I think that as the facts were undoubted, and evidenced nothing beyond themselves, the question was for the judge, was rightly decided by him, and that the judgment should be affirmed on the question argued before us.

But a case has been made for the plaintiff wholly different to that made at the bar and in the court below, a case to which I cannot accede. I deem it, therefore, respectful and my duty to state it, and point out why I dissent from it. It is said that the fact of the train not arriving at the proper spot is primâ facie evidence of negligence, because they do so in the vast majority of instances; that therefore, unless explained, a jury might find negligence the cause of it; that the deceased may well have supposed that the heap of rubbish was the platform, and so properly have stepped out where he did. Now, with all respect, I deny the first proposition. No one swore it was negligence, nor is it a matter of common knowledge that it is. It is true that perhaps ninety-nine times in a hundred the train stops at the proper spot; but when it fails to do so on the hundredth time, I say there is no evidence of negligence. The best marksman who hits the bull's-eye ninety-nine times in a hundred misses once in a hundred. Why? Because he is negligent? If so, inasmuch as it is known beforehand that

1871

Bridges v. North London Railway Co.

once in a hundred times he would miss, you could predict that once in a hundred times he would shoot negligently. But this is not so; he misses once in a hundred times, and the engine-driver misses the platform once in a hundred times from some inscrutable cause of eye or hand or judgment or implement failing, or from deficiency in light, or from heat or cold or damp. As the best sportsman, I believe, sometimes misses an easy bird, the juggler sometimes misses his balls, the tight-rope dancer tumbles, the cricketer and billiard-player miss strokes they made ninety-nine times in a hundred. I say, then, there was no evidence of negligence in this particular. If it was shewn that ninety-nine times in a hundred the platform was reached, but that a particular driver missed it ten times in a hundred, I should say there was evidence of want of skill and care; but that is not this case. This unusual thing must have had an unusual cause, which may have been negligence or something else, as likely one thing as another, and when that is the case there is no evidence. Then, as to the next step in the argument, it *may be* the deceased might reasonably mistake the heap of rubbish for the platform; but where is the evidence of it? Who has proved that it looked like the platform to a person of ordinary vision—that there was that quantity of light there which is on the platform? No one. On the contrary, it is said the tunnel was filled with steam, and it is certain that the place was at a distance from any lamp, and must have been dark. But supposing the argument I have endeavoured to answer well founded, it would, I think, be the grossest injustice to enter the verdict for the plaintiff. For at the outside the case made for her is that there was evidence to go to the jury, but evidence by the hypothesis capable of being met. The presumably negligent engineer might have given excellent reasons why, with all care, he this time missed the platform; and even if there had been evidence that the rubbish looked like a platform, so as to justify the deceased in alighting, evidence to the contrary might have been given. But then it is said at least a new trial ought to be granted. I say no; and I should have said so had this case been made in the Court below, and I there. It would be very inconvenient that parties should shape their cases their own way, not making certain points (perhaps intentionally), and

that then, after the cause has been argued, a new case should be made for one of them, and a new trial granted, to discuss that as to which, it may turn out, there is no foundation. I should have said this in the Court below; but here, it seems to me, it would not only be inconvenient, but beyond our power to grant a new trial for such a reason. Such a new trial is in the discretion of the Court, and ought, at least, to be only on payment of costs; but the Court of Appeal has no power to grant a new trial as a matter of discretion; its duty and power are limited to deciding whether the Court below was right or wrong on the matter before it: see Common Law Procedure Act, 1854, ss. 35–41.

Suppose a bill of exceptions had been tendered, the exception being that the judge ought to have told the jury that calling out "Highbury" was negligence, or evidence of it, a venire de novo could not have been granted, because *perhaps* there was some other evidence of negligence. Neither should this rule be made absolute, or otherwise dealt with, on that ground.

I am of opinion, therefore, that the judgment should be affirmed.

WILLES, J. I am of opinion that the judgment ought to be reversed. I quite agree with my Brother Bramwell that it is not a case in which we ought to grant a new trial, because, looking at the terms of the reservation which has been referred to by my Brother Keating, it appears that the railway company agreed that the verdict was to be entered for the plaintiff if the Court considered that there was any evidence of negligence on the part of the defendants which could properly be left to the jury; and I am of opinion that there was evidence of negligence on the part of the defendants which could properly be left to the jury. I would also observe that the case does not raise any question whatsoever as to the form in which the counsel for the defendants took his points at the trial or in the Court below. There is no such reservation on the case. To import it into the case is to decide according to a supposed bad argument of counsel, and not according to justice on the case reserved and agreed to by the parties. I would also observe that I entirely agree with my Brother Keating, when he says that the reservation, whether there was any evidence of negligence on the part of the defendants which could be properly left

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

to the jury, does shew distinctly that the learned judge and the jury were at variance upon the question whether there was evidence upon which the jury could justify the verdict which they desired to find for the plaintiff; and that it excludes any notion that the learned judge took upon himself to decide that the conduct of the deceased was contributory negligence. And if authority were wanting for that, I should have thought it could be found in the decision of this Court at the sittings after last term, in the case of *Praeger* v. *Bristol and Exeter Ry. Co.*(1), where I think it would be found that upon a similar reservation the Lord Chief Justice, in delivering the judgment of this Court, stated that he considered the question of contributory negligence on the part of the plaintiff

(1) PRAEGER *v.* BRISTOL AND EXETER RAILWAY COMPANY.

7 H.L. 217 219

THIS was an action for injuries alleged to have been received by the plaintiff through the defendants' negligence, tried before Lush, J., at the Bristol Summer Assizes, 1869. At the conclusion of the plaintiff's case the defendants submitted that there was no evidence of negligence to go to the jury, and the learned judge reserved to the defendants leave to move the Court of Exchequer to enter a nonsuit on that ground. The jury found a verdict for the plaintiff. A rule to enter a nonsuit was afterwards obtained pursuant to the leave reserved, "on the ground that there was no evidence of negligence to leave to the jury." This rule was made absolute in Hilary Term, 1870, the Court of Exchequer being of opinion that the plaintiff's negligent conduct alone caused the accident. From this decision the plaintiff appealed to the Exchequer Chamber.

Feb. 9, 10. *Prideaux, Q.C.* (*Edlin, Q.C.*, and *C. S. C. Bowen*, with him), argued for the plaintiff.

Sir J. B. Karslake, Q.C. (*Cole, Q.C.*, *Lopes, Q.C.*, and *Murch* with him), for the defendants.

(1) See 5 C.B. 460 n (a)

COCKBURN, C.J., gave judgment for the plaintiff, reversing the judgment below, on the ground that there was ample evidence of negligence on the part of the company. With regard to the question of contributory negligence, he said:—"It has been argued that the plaintiff's own conduct was such as to preclude him from recovering. But there cannot, in my opinion, be any question upon this rule as to *his* negligence, unless indeed the accident was wholly attributable to it. The leave to enter a nonsuit was entirely on the question of whether or not there was any evidence of the company's negligence. That this was so is clear from the terms of the leave reserved and of the rule. As to the plaintiff's conduct, that was left to the jury, who, by finding for the plaintiff, must be taken to have found that he exercised a reasonable amount of care, and no leave was reserved on that point."

WILLES, KEATING, MELLOR, MONTAGUE SMITH, LUSH, AND BRETT, JJ., concurred in thinking that there was evidence of negligence, which was properly submitted to the jury.

was not involved in the question whether there was any evidence of negligence on the part of the defendants. And that also, in my judgment, ought to have been excluded in the judicial consideration of this case.

It is right, however, that I should add that if that did arise, there is a remarkable peculiarity in the judgments which have been delivered against the plaintiff, on the ground that there was contributory negligence on the part of the deceased, as to which no question is reserved by the case which is laid before the Court. That peculiarity is this, that the arguments shewing that the deceased was contributorily negligent are founded on matters of fact, and not on matters of law; and on matters of fact which, on looking at this case, appear to me to be excluded by statements of fact in the case. It is suggested, for instance, that the deceased ought not to have got out in the tunnel. That is one of the facts which is supposed to shew that he was contributorily negligent. But if the statement in the case be referred to, and if the plan accompanying the case had been looked at, it would have been found that the platform ran for twenty feet under the tunnel, ten feet of which were flat platform on which a passenger might have got out. It is suggested that the passenger ought not to have got out on the part of the platform in the tunnel. There was a continuation of the same narrow platform on into the open space. Will any one suggest that he might not have got out on that? If not, why not? Who would suggest that there was anything to prevent him from doing so, or that that platform was intended for anything else but for passengers to get out upon? These facts demonstrate that the suggestion that to get out in the tunnel was evidence of negligence is to suggest something which is inconsistent with the facts. Then it is suggested that the deceased ought not to have got out because there was no light. It appears, on looking at the plan, that there was a lamp near the mouth of the tunnel which might have lighted the tunnel in the spot where the accident took place, which was 27 ft. 11 in. from the lamp. I will not go into the question of how far the lamps used on railways usually throw light. It appears to me to be a question of fact. I cannot help thinking, with regard to the suggestion that there was no light at the place where the deceased got out, that at the distance

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

of 27 ft. 11 in. from the lamp, the jury might possibly suppose there was some light which might have the effect either of leading or deceiving. Now had it the effect of leading or deceiving in this case, and, if of deceiving, was it by reason of some act of the railway company? It appears to me that the light was such that it had the effect of deceiving. It happened that there was steam in the tunnel. The light was at the distance of 27 ft. 11 in. It will be observed, by looking at the plan, that a person might get out of the carriage on the part of the platform which was within the tunnel; and it will be observed, on looking at the place where the deceased was found on the rubbish, that the rubbish presented an appearance, as it were, of a place to descend on like the platform, which might well have deceived a person stepping out. Then it is suggested that this was a very short-sighted man, and therefore he ought not to have stepped out. I am sorry to hear it. A short-sighted man may see tolerably well as far, at least, as the place that he is about to put his foot on; and it may well be that the man—whether he was short-sighted or long-sighted, finding the train stop near the place in the tunnel at which he knew he might get out, and seeing an image of the platform represented by the rubbish which the company put in the tunnel, and which to his mind appeared to be a continuation of the platform—should have trodden on that, and by reason of the roughness and rudeness of what he stepped on have met with the accident. This appears to me to be a matter of ordinary reasoning which the jury, as ordinary reasoning men of the world, might properly and justly have arrived at. And upon that no doubt, if they formed any judgment, they would have come to a conclusion that there was no evidence of contributory negligence, which, so far as I can judge from the case, has for the first time been started in this Court, in order to put off the decision of the question whether there was evidence of negligence on the part of the company.

Now I come to the question whether there was evidence of negligence on the part of the company. It appears to me that there was evidence of negligence on the part of the company. But it is said: "Will the Court hold that the calling out the name of the station on a railway is an invitation to alight?" I answer: Certainly not; nobody will suppose so; nobody who

travels by railway who had a head on his shoulders ever said so. And I believe the decision of this case at the trial and in the court below may very well have proceeded on that sort of notion that people were under the impression that anybody might get out as soon as the name of the station was called out. It would be perfectly ridiculous to suppose that any such thing is the case. But I agree with what has been said by my Brother Channell, that it is an invitation to get out or not according to the circumstances. It is an announcement by the railway officers that the train is approaching, or has arrived at, the platform, and that the passengers may get out when the train stops at the platform, or under circumstances induced and caused by the company, in which the man may reasonably suppose he is getting out at the place where the company intended him to alight. To that extent calling out is an invitation. I would further observe, with respect to the expression "Keep your seats," that it seems to me in this case to be more important than the calling out "Highbury;" because, after "Highbury" was called out, the passenger who got from the carriage preceding that in which the deceased was, and who must have got out on the platform and not on the rubbish, had time to get out before "Keep your seats" was called out: and as soon as he got out, it appeared that the porter cried out "Keep your seats." Why so? Because he discovered that some mistake or other had been committed, and because he felt that, unless a warning was given, that mistake, which was the mistake of the servants of the company, might lead the passengers into doing something, without any negligence on their part, that would endanger them from an attempt to get out. At that moment the train was standing still. The person who had got out heard "Keep your seats" called before the train moved on: he heard the groan of the deceased: he went back towards the place where the groan was heard, and found the deceased man lying with his leg broken on a heap of stones, and with his legs between the wheels of the carriage. Therefore the carriage had not moved on to the platform at the time he got out. He had got out, no doubt, while the carriage stopped, thinking it was in the place where he might safely get out, owing to, as a jury might well have supposed, a deceptive image placed by the company before his eyes, which led

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

to his fall and to his death. Was it his fall that induced the man to say "Keep your seats;" and would he have had an opportunity of getting out at any other place if he had not got out where he did? All these are matters which appear to me to be very proper for a jury to consider, and which I only mention, not as asserting any positive opinion of my own, beyond this, that there was a question of fact on which the opinion of the jury ought to have been taken. Then it is said that the stopping short of the platform comes to nothing, either because the machinery of the railway is so difficult to manage that it is uncertain whether you ever can stop at a platform when you like, or there may be occasions, intentionally or accidentally, in which the train does not stop at the platform. The former of these suppositions was too absurd to be insisted upon. Everybody who is in the habit of travelling on railways is aware that, under ordinary circumstances, unless there is something to prevent the train from stopping at the platform where the passengers can alight, the train does stop at the platform, and stops at the platform without any difficulty, and especially in a case like this, where the platform was abundantly long for the whole train to stop at and the passengers to get out in safety. I will not, notwithstanding the example that has been set me, refer to any experience of my own; but I might well refer to the experience of the jury, some of whom, no doubt, had travelled largely on railways, to know whether it is not the case that ordinary trains do come up so that the passengers may step out on the platform. If a train stopping short of the platform were to stop under circumstances in which passengers could see before them, and they chose to jump out and injure themselves, we come back to the first point which I have dealt with; but we are dealing with short-sight and an unfortunate state of light, and with circumstances representing the image of arriving at the actual platform. Well, but then comes the second answer: that this may have been only an accident. This may be only one case in which the train has so stopped, out of a hundred or a thousand cases in which it has stopped properly. Let us consider that, and see the reason of it. I think the fallacy of it will become more evident the more it is considered. The train stopped there either through design or accident. Trains sometimes

may go beyond the platform; the jury might have known that they do; those who have observed would know that they do go beyond the platform, or stop short of it, for certain purposes which are convenient to the servants of the company. Such things, we know, have happened. Or it may be, owing to some negligence, by having a driver who did not know what he was about on the train, or from some other mismanagement, the train may not properly have come up to the platform; or there may have happened one of those various accidents referred to, and which might, without any design on the part of the company or the servants of the company, have made it not improper that on this occasion the train should stop there. But who is to prove all that? Who is to give an explanation, and shew that it was right or wrong that the train should have stopped as it did on this particular occasion? Is he who complains of the company's proceedings to exclude the assumption that this may be the only one of the one hundred times in which the train stops short? Is he to go through the history of that train for ninety-nine days before, and to shew that it stopped at the platform on each of those ninety-nine days, and that this stopping was a thing designed on the part of the company, and by which they exposed their passengers to the stepping out in the tunnel? Is it reasonable, or is it logical, to suppose against a person, who does not give that evidence when the company can give it, that this is only one of the one hundred times, and to assume that there were no ninety-nine times preceding? It appears to me, on this part of the case, that the fact that the company did give an ordinary notice that the train was about to stop, that it did stop at the station, and that it stopped under circumstances in which the jury might properly suppose that the passenger might reasonably get out, and that he did get out,—that all this clearly threw upon the company the onus of giving some explanation of the stopping, so as to shew that the deceased did not get out owing to negligence on their part. The onus was clearly thrown on the company of doing that; the evidence given puts a burden on them; and as they did not sustain it, there is a primâ facie case of negligence on which the jury might properly find, as they intended to do.

If I were asked to say what is the duty of a carrier, by neglect

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

of which the injury to the deceased was caused, I should state it in these terms: It is the duty of the carrier of passengers for hire generally to abstain from exposing them, by any act or default of his, to unusual and unnecessary danger. It is the duty of the carrier particularly to give the passengers a reasonable opportunity of alighting with safety at their destination; and this involves a duty not to mislead them, either by design or negligence, into reasonably supposing that they may alight, and so alighting in an unsafe and improper place.

It appears to me that the jury were justified in concluding that the deceased, without any fault of his own, or if by any fault, no fault found by the jury, and unreserved to us, came to his death, first, by injuries received in getting out of the defendants' railway carriage; secondly, at a place which was unfit and dangerous to alight upon; thirdly, under circumstances in which he might reasonably suppose he could get out with safety; fourthly, which were primâ facie under the control of the defendants' servants; fifthly, which were not usual or customary, and were dangerous to passengers; sixthly, which, if caused by any accident or fault of others than the defendants, the defendants could have explained, and of which they offered no explanation.

In my judgment the decision of the Court of Queen's Bench ought to be reversed.

7 H & L 237

KELLY, C.B. The first question in this case is as to the effect of the calling out the name of a station at which a railway train has arrived; and whether it is (not indeed an invitation in all cases to alight) but an intimation in the absence of qualifying circumstances, and the train having stopped (as was the case here), to passengers intending to alight at that station, that they may alight in safety. I think that this is a question for the jury. It is one entirely of fact, and the answer to it, independently of any additional circumstances in any particular case, involves the practice of railway companies, and the natural effect upon the mind of a passenger who, intending to alight at a particular station, and having arrived at that station, must either alight at once, or, if he remain in the carriage, incur the risk of being carried on to a different and perhaps a very distant place. All this, which raises no question of

law at all, seems to me to be in each particular case a matter peculiarly for the consideration of the jury; and the question, in this case, upon the effect of the train having stopped and the word "Highbury" being called out by the railway servants, not having been left to the jury, I think on that ground alone, and if the case stopped there, the nonsuit should be set aside and the rule made absolute. For if upon that question being left to them they should have thought, as I do, that the calling out "Highbury" did import in this case such an intimation, then it was evidence of negligence, for them to consider, that the company's servants did not also call out "Keep your seats within the tunnel," or some such words, so as to have been heard by the passengers there. But in this, as it might be in many other cases, the question for the jury seems to be compounded of the effect of this notification to the passengers, and of the circumstances in which the passengers within the tunnel were placed when it reached their ears. A portion of the train in question, consisting of several carriages, in one of which was the deceased, was there, and had not reached the platform, and perhaps from the want of lamps there as well as from a quantity of steam having escaped, it was difficult or impossible for a passenger to see where he was stepping to in alighting from the carriage. Then it appeared that to the cry of "Highbury" was added "Keep your seats," but not till after the train had stopped, and a passenger within the tunnel, and probably the deceased, had alighted; and further, that upon the spot at which deceased alighted there was a heap of hard rubbish which may have caused or contributed to the fall which occasioned his death. On the other hand it may have been a question whether, if the darkness was such that the deceased was unable to see where he was stepping to, he ought not at all risks to have remained where he was until there should be light enough for him to see what he was about. All these circumstances presented a case which, if it had been left to the jury, might have justified a finding of contributory negligence, though, for the reasons assigned by my Brother Willes, they might well have come to the contrary conclusion.

The question, which we are now to determine upon the whole case, and which is quite apart from that of contributory negligence,

1871

BRIDGES v. NORTH LONDON RAILWAY CO.

is whether there was any evidence whatever of negligence on the part of the defendants which ought to have been left to the jury. I agree, as I have already observed, that there was no doubt evidence to be submitted to the jury of contributory negligence on the part of the deceased, inasmuch as it may be well contended that at the time when the train stopped and the word "Highbury" may have reached his ears, the tunnel being in a state of almost complete darkness, he ought to have remained in the carriage until the train should have advanced to the platform, or a light had been brought into the tunnel. But even in this view of the case the question arose, and I think ought to have been submitted to the jury, whether the leaving a heap of hard rubbish within this tunnel was not negligence in the company, although it may have been countervailed by or combined with the evidence of contributory negligence on the part of the deceased.

Independently, however, of that part of the case which involved a charge of contributory negligence, I am of opinion that the question should have been submitted to the jury whether there was negligence on the part of the company in calling out "Highbury," while passengers who might intend to alight at that station were within the tunnel, that is to say, in a place in which they could not alight in safety without, at all events, adding some such words as "Keep your seats within the tunnel," or giving some warning that passengers within the tunnel should not alight.

On these grounds I am of opinion that there was evidence of negligence in the defendants, and therefore that the nonsuit should be set aside and the rule made absolute. But a majority of the Court being of a contrary opinion, the judgment of the Court of Queen's Bench must be affirmed.

Judgment affirmed.

Attorney for plaintiff: *Fluker.*

Attorney for defendants: *Blenkinsop.*

THE QUEEN ON THE PROSECUTION OF LOVIBOND *v.* PRICE AND OTHERS. 1871
April 26.

Parliamentary Elections—Corrupt Practices Prevention Act (26 & 27 *Vict. c.* 29), *s.* 7—*Power of Commissioners to refuse Certificate to Witness—Review of decision of Commissioners—Mandamus.*

By 26 & 27 Vict. c. 29, s. 7, when any witness shall answer every question relating to corrupt practices at a parliamentary election which he shall be required to answer, and the answer to which may criminate or tend to criminate him, he shall be entitled to receive from the commissioners appointed to investigate corrupt practices, a certificate stating that such witness was, upon his examination, required by the commissioners to answer questions the answers to which criminated or tended to criminate him, and had answered all such questions, and if any proceeding be at any time pending against such witness for corrupt practices, such proceedings, on production of such certificate, shall be stayed.

Held, that if a witness has in point of fact answered all such questions, he is entitled to a certifiicate; and that if the commissioners refuse to grant a certificate to the witness on the ground that they are of opinion that he has not answered the questions, their decision is not final and conclusive, and may be reviewed by mandamus.

MANDAMUS. The writ recited that, by a royal commission issued for the purpose of causing inquiry to be made into the existence of corrupt practices in the borough of Bridgewater, E. P. Price, T. C. Anstey, and C. E. Coleridge, Esquires, were the commissioners named in such commission; and that they commenced their inquiry; and that one Lovibond having been summoned, personally appeared before them to be examined touching the subject-matter of the inquiry; and that upon the inquiry he was sworn and was required to give, and did give, on oath certain evidence, and truly answered every question relating to the matters there inquired into which he was required by them to answer, and the answers to which criminated or tended to criminate him; and that he was, in consequence of so answering, entitled to receive from them, and it was their duty to give him, under their hands, a certificate stating that he was, upon his examination, required by them to answer questions relating to the matters aforesaid, the answers to which criminated or tended to criminate him; and that he had answered all such questions; and that Lovibond applied to them for a certificate as aforesaid, and they refused to give him such certificate; and the writ commanded the commissioners to give Lovibond such certificate as aforesaid.

1871

THE QUEEN v. PRICE.

Return: We, the commissioners in the writ named, were, by warrant under the royal sign manual, dated, &c., duly appointed commissioners, pursuant to 15 & 16 Vict. c. 57, for the purpose of making inquiry into the existence of corrupt practices at the last election of members to serve in parliament for the borough of Bridgewater; and, in pursuance of such appointment, and under the authority of the law in that behalf, Lovibond was duly summoned, and appeared, and was examined on oath before us in relation to such practices; and in the course of such examination Lovibond was duly required by us to answer certain questions relating to such corrupt practices, the answers to which might criminate or tend to criminate him; and having so examined Lovibond, and duly required him to answer such questions, we, the said commissioners, after due deliberation and consideration thereon had, were of opinion, and duly adjudged and determined, that Lovibond had not answered every one of the questions the answers to which might criminate or tend to criminate him; and thereupon, and for the reasons aforesaid, we, the said commissioners, were of opinion, and duly adjudged and determined, that the said Lovibond was not entitled to receive from us, and that it was not our duty to give, and we declined and refused, and still refuse, to give him such certificate as in the said writ is in that behalf mentioned.

Demurrer and joinder. The chief point being whether or not the decision of the commissioners was conclusive.

Sir R. P. Collier, A.G. (*Sir J. D. Coleridge, S.G.*, and *Archibald* with him), for the defendants, stated that the question raised by the demurrer was the same which was argued upon the rule for the mandamus, and that he was content that the Court should, if they so pleased, without further argument, pronounce judgment for the crown, so that the defendants might at once proceed to the Exchequer Chamber.

H. James, Q.C. (*T. W. Saunders* with him), for the prosecutor.

COCKBURN, C.J. Although the decision of this Court in ordinary cases making a rule absolute for a mandamus is not to be taken as binding the Court upon the return to a mandamus, but is merely

an expression of an opinion that there is sufficient shewn to call for an answer; yet as this case was very fully argued upon the rule, and each member of the Court entertained and expressed an opinion strongly in the prosecutor's favour, and we have heard nothing to lead us to the belief that we are likely to change our opinions, there will be no useful end accomplished by a re-argument. Our judgment, therefore, may at once be given for the prosecutor, but this course must not be taken as a precedent.

Judgment for the Crown.

Jan. 20, 1870. The points on the rule were: first, whether Lovibond had answered all questions; secondly, whether the commissioners' decision was conclusive on the point. The arguments, on the second point, and judgments were as follows:—

Sir R. P. Collier, A.G., Sir J. D. Coleridge, S.G., and *Archibald*, shewed cause. The commissioners, before they decide whether they will grant or refuse a certificate, must exercise a discretion; and if they have exercised that discretion this Court will not interfere by mandamus. They have exercised their discretion, and refused the prosecutor a certificate. The contention on the other side is, not that the commissioners should exercise a discretion, but that they should grant a certificate as a matter of right. By s. 7 of 26 & 27 Vict. c. 29 (1), which in substance is the same enactment as ss. 9 and 10 of 15 & 16 Vict. c, 57, no witness

(1) 26 Vict. c. 29, s. 7: "No person who is called as a witness before any election committee, or any commissioners appointed in pursuance of the Act 15 & 16 Vict. c. 57, shall be excused from answering any question relating to any corrupt practice at, or connected with, any election forming the subject of inquiry by such committee or commissioners, on the ground that the answer thereto may criminate or tend to criminate himself: Provided always, that where any witness shall answer every question relating to the matters aforesaid which he shall be required by such committee or commissioners (as the case may be) to answer, and the answer to which may criminate or tend to criminate him, he shall be entitled to receive from the committee under the hand of their clerk, or from the commissioners under their hands (as the case may be) a certificate stating that such witness was, upon his examination, required by the said committee or commissioners to answer questions or a question relating to the matters aforesaid, the answers or answer to which criminated or tended to criminate him, and had answered all such questions or such question." The section then proceeds to enact that if

1871

THE QUEEN v. PRICE.

called before the commissioners shall be excused from answering any question on the ground that the answer may criminate him; but when such witness shall answer every question the answer to which may criminate him, he shall be entitled to a certificate. Reading this section by the light of the repealed sections in the former Act, which require a witness to make a true disclosure to entitle him to a certificate, it must receive the same construction, and the witness is not entitled to a certificate under s. 7 unless he has made a true disclosure of the facts. The commissioners, before granting a certificate, must determine three questions: First, whether every question has been answered; secondly, whether the answers are true; and thirdly, whether they criminate the witness. The granting of the certificate, therefore, implies that a judgment is to be exercised. This judgment must be exercised by some one, in this case by the commissioners. In the solution of these questions law and fact are involved, and the decision of the commissioners is final. They are a judicial body, and can commit for contempt: *Fitzgerald's Case.* (1) They are in the same position as a judge trying an election petition under 31 & 32 Vict. c. 125, or a committee of the House of Commons, who also must exercise a judgment in granting a certificate; and

---

any proceedings be thereafter pending in any court against the witness for any offence under the Corrupt Practice Prevention Acts, the Court shall, on production and proof of such certificate, stay the proceedings.

By s. 9 of 15 & 16 Vict. c. 57, "Every person who has been engaged in any corrupt practice at or connected with any election of members . . . to serve in parliament for any county . . . or place to which any inquiry under this Act relates, and who is examined as a witness, and gives evidence touching such corrupt practice before the commissioners . . . and who upon such examination makes a true discovery, to the best of his knowledge, touching all things to which he is so examined, shall be freed from all criminal prosecutions" . . . and no person shall be excused from answering any question put to him by such commissioners on the ground of any privilege, or on the ground that the answer to such question will tend to criminate him.

By s. 10, "Where any witness is so examined as aforesaid, such witness shall not be indemnified under this Act unless he receive from such commissioners a certificate in writing under their hands, stating that such witness has upon his examination made a true disclosure touching all things to which he has been so examined;" and if any proceedings be pending in any court against any person so examined, the Court shall, on production and proof of such certificate, stay the proceedings.

(1) Law Rep. 5 Q. B. 1.

1871

THE QUEEN v. PRICE.

if the commissioners can be compelled to grant a certificate, a judge or a committee of the House of Commons can also be compelled; but it cannot be contended that the decisions of a judge or of the committee are reviewable by mandamus. And further, if the decision of the commissioners is not final, it must be reviewed by a jury; and it could never have been the intention of the legislature that the decision of the judge or of the committee of the House of Commons as to whether the witness had answered every question and answered truly, and whether the answers criminated him, should be tried by a jury, who might come to a different conclusion. The commissioners are in precisely the same position. If the exercise of the commissioners' discretion in refusing a certificate can be reviewed by issuing a mandamus, the exercise of it in giving a certificate may be reviewed by granting a writ of certiorari; yet it never could have been intended that after a certificate had been granted it should be taken away.

H. James, *Q.C.*, and *T. W. Saunders*, in support of the rule. It may be admitted that a witness must answer every question truly before the commissioners can grant him a certificate, but if he answers every question truly, he is entitled to it as a matter of right. The object of the Acts of Parliament (15 & 16 Vict. c. 57, and 26 & 27 Vict. c. 29) is to obtain information as to the existence of corrupt practices in a constituency, not to obtain evidence to punish individuals. If the commissioners withhold their certificate, they might condemn a person to penal consequences without hearing him. They may compel the attendance of a witness, ask him such questions as they please, and then refuse him a certificate without hearing any explanation; and if the decision of the commissioners is final, and a mandamus will not lie to review their decision, he is without remedy, and the intention of the legislature to protect a witness would be defeated. It may be inconvenient to try such a question before a jury, but it is more inconvenient to allow the commissioners to condemn a person unheard. It has been said that if a witness has improperly obtained his certificate, this Court will not grant a writ of certiorari to bring it up in order to quash it; but it is no argument, because a witness, after having received a certificate, may not be deprived of

1871

THE QUEEN v. PRICE.

it, to say that a witness who is entitled to it shall not have it. If the question is doubtful, the mandamus ought to go.

COCKBURN, C.J. This rule for a mandamus must be made absolute. Two points present themselves for our consideration: the first, whether there is reasonable ground to submit for further consideration and decision the question whether Mr. Lovibond has answered the questions put to him so as to entitle him to the certificate which the Act of Parliament says shall be given in such cases; the second, whether, assuming that Mr. Lovibond was entitled to the certificate, this Court can interfere by mandamus to compel the commissioners to give him a certificate. I am of opinion that upon both these points there is quite enough to entitle the prosecutor to a mandamus, with a view that the matter may be put in train for further adjudication. I will take the legal point first. I quite agree with the Attorney-General that if the former statute of 15 & 16 Vict. c. 57, had still remained in force, unaffected by subsequent legislation, this Court could not have interfered. I take the effect of the provisions of 26 & 27 Vict. c. 29, to be this: that in inquiries conducted before these tribunals a witness is no longer to have the privilege of refusing to answer a question if the effect of the answer is to criminate him, but that, on the other hand, he is to have immunity from further proceedings, criminal or civil, to recover penalties, being instituted against him, if he answers, or, according to the earlier statute, "makes discovery" of the facts as to which the inquiry is being held, and so answers as to obtain a certificate from the persons who are acting as judges in that inquiry. I think that upon the earlier statute the immunity of the witness depends upon the granting of the certificate; and there being no provision that he shall be entitled to that certificate as of right, it was in the discretion of the commissioners to grant it or not; and if the witness did not get the certificate, he had no means of compelling the commissioners to grant it. It is, however, a very different question when we come to consider s. 7 of 26 & 27 Vict. c. 29. I think that when the legislature, in legislating in pari materie and substituting certain provisions in that Act for those which existed in the earlier statute, has entirely changed the language of the enactment, it must be

1871

THE QUEEN v. PRICE.

taken to have done so with some intention and motive. In s. 7 of 26 & 27 Vict. c. 29, the witness who is called upon to answer questions tending to criminate him, and does answer, is by the terms of the section entitled to have the certificate. It is true that there are difficulties in the exercise of the jurisdiction of this Court, in controlling the decision of the commissioners, or it may be a committee of the House of Commons, or it may be, now, of an election judge. I think, however, with regard to an election judge, that, as at the time the statute passed no such jurisdiction existed, we must read the statute with reference to the only two cases which it provided for, namely, a committee of the House of Commons and commissioners appointed to carry on such an inquiry as this. It is very true that there are difficulties, but on the other hand, it is to be observed, in the case of a committee of the House of Commons, that as soon as the committee have made their report they are functi officio, they cease to exist, and it would therefore be impossible to apply the proceeding by mandamus to such a body as that. As the Act of Parliament distinctly says that the witness who has given answers shall be entitled to a certificate, where we have a body of persons, as we have in the commissioners, who are still in existence, and to whom the process of this Court may still attach, I do not see my way to the conclusion, because in the one case the exercise of the jurisdiction would be impossible, that therefore it is not to be exercised in the case in which it is possible. On that point, however, there may be some room for doubt, some room for contesting the jurisdiction, but I do not think the doubt upon that question so strong as that we ought to decline to issue the mandamus upon the return of which the question of jurisdiction may be more fully considered and determined, and if necessary taken to error. I think that in the present case there is sufficient reason for urging that the witness is entitled to ask this Court for a mandamus, and that primâ facie a case is made out which requires further consideration; and we ought not to hesitate to make the rule absolute for a mandamus upon the return to which the law upon the subject may be more fully considered.

BLACKBURN, J. I agree that this rule should be made absolute, and I agree with the learned counsel who argued against this

1871

THE QUEEN v. PRICE.

rule, where a discretion is given to a body of persons who are to exercise it, that, though this Court can compel by mandamus the exercise of that discretion, it never can require its exercise in a particular way. The Court can order a court of quarter sessions to entertain a case, and try whether or not a man is guilty; or, which is a better illustration, order a magistrate to hear all the evidence brought against a man, and determine whether he will commit him for trial or not. The Court could not order the magistrate to commit, because a magistrate has a discretion as to a committal for trial, and to order him to commit would be to direct him to exercise his discretion in a particular manner. Therefore, whenever it is a matter of discretion, all we can do is to compel the officer to take the matter into consideration and decide upon it. But where the common law or the legislature has cast on a person the obligation, where certain facts exist, not to form his opinion or exercise a discretion, but to do a certain thing, then, no doubt, there is a preliminary inquiry whether those facts exist, and no doubt the person called upon to perform the obligation must, to some extent, exercise common sense, and see whether the facts do exist. If the facts exist, we have then the power to issue a peremptory mandamus, ordering the person to do the thing which the law makes it incumbent on him to do. That being the law, established by numerous decisions, the question is, does the legislature enact that the commissioners should exercise a discretion in granting a certificate stating that the questions had been answered? If so, all that we could do would be to order the commissioners to take the matter into consideration. Or does the enactment mean that if the facts do exist, the commissioners shall grant a certificate? If so, then we ought to order that a certificate be given. The statute 15 & 16 Vict. c. 57 is unrepealed, except as to ss. 9 and 10, the former of which says: Every person who gives evidence before the commissioners appointed under this Act to make such inquiry, and who, upon such examination, makes a true discovery to the best of his knowledge, touching all things to which he is so examined, shall be freed from all penal actions and all criminal prosecutions to which he may have been or may become liable or subject; and then the statute proceeds —not in terms as a proviso, for it is a separate section, but it is in reality a proviso—that where any witness has been so examined he

shall not be indemnified unless he receive from such commissioners a certificate under their hands, stating that he has made a full disclosure. There is no doubt that the indemnity of a witness rests upon two grounds: one, that he had really made a true discovery to the best of his knowledge, which is an extensive phrase, and the other that he should obtain from the commissioners a certificate that he had done so. I think that the true construction of the earlier statute was, that the commissioners were to exercise a discretion, and that this Court could not have compelled them under that statute to do more than to exercise that discretion. But then the legislature has repealed those two sections, and instead of them, s. 7 of 26 & 27 Vict. c. 29 is passed, and the provisions therein contained extend not only to commissioners of inquiry but to election committees. Now, the words of that section are quite different from those in the earlier Act. In the first place, they have been extended to election committees, and there is a point on that to which I will presently refer, and which to some extent bears on the construction of the section. Then, instead of providing that it shall be a full disclosure of all the witness knew about the matters which are being inquired into, it enacts, that if he is asked questions, the answers to which tend to criminate him, and he does answer them, he is to be entitled to a certificate, though he may utterly have refused to answer every matter of the inquiry that did not tend to criminate him. So that if a man answers frankly and fully to all questions, such as, "Did you commit bribery?" but when he is questioned, as to a part of the inquiry which may be a very material one indeed, as, "Do you not know, or cannot you relate, circumstances which shew that the candidates were parties to it, or that bribery was universal?" or other matters of that sort, he may baffle the commissioners completely, and yet be entitled to his certificate. I do not think that the legislature when they passed the Act intended this; I only mention it because in the event of further legislation it is for the legislature to consider whether the provisions of the earlier Act were not better than those of the present one which have been substituted for them. Then s. 7 goes on to say, not that the witness shall have no indemnity unless he gets his certificate, but it enacts in express terms that he shall be entitled

1871

THE QUEEN v. PRICE.

to a certificate. Now it is highly probable that the legislature were not thinking of the consequences which would follow from a witness being entitled to a certificate absolutely, namely, that a jury might overrule the decision of the election committee in one case, or the commissioners in the other; but the legislature have used words which, in the ordinary way of legislation would be proper and correct words to express that perfectly legal right to a certificate, provided that the circumstances exist; and I see nothing which militates against that construction. There are two arguments which I have listened to attentively against giving these words their natural meaning, namely, that if it is to be considered as a positive legal right, the legislature could not have meant it, because when the witness has truly answered, it must inevitably require some consideration whether the commissioners will let him have a certificate or not, and they cannot be expected by the legislature to put their hands and seals to a certificate of fact which, though a jury under the direction of a judge might think perhaps true, they themselves would think false; that in reality, from the very nature of the thing, when any person is required to certify facts which have happened before him, the legislature must have meant to certify according to his belief. That argument is one which may raise some difficulty, but can hardly, I think, override the express words of the Act of Parliament. I quite agree with what my Lord said, with reference to a mandamus issuing to an election committee,—when once the committee have given in their report and ceased to sit, a mandamus could not have been granted. Then there was an argument that the legislature could not have intended that the proceedings of the commissioners should be reviewable by mandamus, and could not have intended to make the granting of a certificate a perfectly legal right to be enforced by a mandamus. But I do not think that this argument, upon the whole, is sound. If the legislature have enacted that a witness is to be entitled to a certificate, then I think a mandamus ought to go. That is the opinion I have formed, and if I had to decide finally, I should decide to that effect. The writ must go, and, if it is advisable, the question may be taken to the House of Lords.

MELLOR, J. I am not at all insensible to the inconvenience

which must necessarily result from the mode of trying the issues upon a writ of mandamus; but at the same time, notwithstanding those inconveniences, I confess that I do not regret the change in the language of the present Act of Parliament as compared with the language of the earlier Act, because, when we consider the consequences which follow from the refusal of a certificate to a witness who has been examined before the commissioners, and the policy of the law, which is to induce persons to come forward and make a full disclosure of the corrupt practices in which they may have taken part, not for the purpose of punishing them, but for the purpose, as Mr. James truly pointed out, of enabling the legislature to disfranchise and punish boroughs in which those corrupt practices had extensively prevailed, I think it is desirable that there should be some means of reviewing the decision of the commissioners. Upon the construction of the statutes, I am of opinion that the writ of mandamus is the remedy in this case. When I look at the distinction in the language between the earlier Act and the present Act, I think that the alteration must have been made for the purpose of preventing the judgment of the commissioners on the sufficiency of the answers being conclusive. It is simply a question of fact—did or did not the witness answer—and that is the condition upon which the right to the certificate depends. The section does not provide that the witness shall answer every question to the satisfaction of the commissioners, but merely that he shall answer "every question relating to the matters aforesaid, which he shall be required by the commissioners to answer, and the answer to which may criminate or tend to criminate him." If we are satisfied in point of fact that the questions which were asked by the commissioners were answered by the witness so far as he was bound to answer, then the witness is entitled to his certificate as a matter of right, and that being so, his remedy is by mandamus to compel the commissioners to grant it in the event of their declining. I think it is highly politic to encourage witnesses to come forward and give their evidence; and if they really do state all the facts which are required for the purposes of the inquiry, they ought to be entitled to an indemnity; and I think the consequences would be serious if the impression prevailed that the commissioners can

1871

THE QUEEN v. PRICE.

arbitrarily, and without review, refuse to give a witness his certificate.

LUSH, J. After the judgments of my Lord and my learned Brothers, I do not think it necessary to say more than that I agree that the writ ought to issue.

Rule absolute.

Attorney for prosecutor: *John Bishop.*
Attorney for commissioners: *Solicitor to the Treasury.*

May 3.

THE QUEEN, ON THE PROSECUTION OF GRIFFITH OWEN *v.* THE CAMBRIAN RAILWAY COMPANY.

Compensation under Lands Clauses Consolidation Act (8 *Vict. c.* 18, *ss.* 3, 68), *and Railway Clauses Consolidation Act* (8 *Vict. c.* 20, *ss.* 6, 16),—"*Injuriously affected*"—"*Lands*"—*Hereditament—Ferry.*

A railway company were empowered by their Act to construct across a river, a few hundred yards above an ancient ferry, a railway-bridge and a footway for passengers, from whom they were authorized to take toll; the bridge and way were constructed and used accordingly, and the consequence was that the traffic over the ferry was greatly reduced. The railway works in no way obstructed the ferry or the approaches to it on either side. The owner of the ferry claimed compensation under the Lands and Railway Clauses Consolidation Acts:—

Held, that the ferry, being a franchise, and therefore an hereditament, was "lands" within the definition of s. 3 of the Lands Clauses Consolidation Act, and that it had been "injuriously affected" within the Acts: for that the direct and immediate effect of the construction of the bridge was to divert the traffic and so injure the ferry.

Ricket v. *Metropolitan Ry. Co.* (Law Rep. 2 H. L. 175), and *Brand* v. *Hammersmith Ry. Co.* (Law Rep. 4 H. L. 171) distinguished.

CASE stated by consent upon a return to a mandamus commanding the defendants to take up an award and to furnish a copy thereof to the prosecutor under s. 35 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18).

1. The prosecutor is, and has been since February, 1863, the owner in fee in possession of an ancient and exclusive ferry across the mouth of the river Mawddach, near the town of Barmouth, in the county of Merioneth, and connecting the turnpike road on

either side of the ferry, which ferry has landing-places at which the prosecutor is and has been accustomed as of right to land and embark passengers, cattle, and merchandize, one of such landing-places being on the south side of the river and two on the north side of the river.

2. The ferry has been for many years, and down to the time of the erection by the defendants of the bridge, footway, and works, hereinafter mentioned, and of the exercise of the powers granted to the defendants under their Acts of Parliament, extensively used for the conveyance across the river at and from the places and in the manner mentioned in par. 1, by the prosecutor and his predecessors, owners of the said ferry, of passengers, goods, horses, sheep, cattle, and carriages, and was, down to the said time, the only means of communication, within seven miles, between the north and south sides of the river.

3. By the Aberystwith and Welsh Coast Railway Act, 1861, (24 & 25 Vict. c. clxxxi.), the Aberystwith and Welsh Coast Railway Company was authorized to make a railway amongst other railways from Aberystwith to Barmouth and Portmadoc, and to make a viaduct over the river Mawddach in connection therewith; and by the Cambrian Railway Act, 1864 (27 & 28 Vict. c. cclxii.), the defendants were incorporated by the amalgamation of certain companies therein named; and by the Cambrian and Coast Railways Amalgamation Act, 1865 (28 & 29 Vict. c. ccxxci), the Aberystwith and Welsh Coast Railway Company was amalgamated with, and their undertaking became part of, the undertaking of the defendants.

4. By the Aberystwith and Welsh Coast Railway Act, 1863 (26 & 27 Vict. c. cxli.), the Aberystwith and Welsh Coast Railway Company was authorized to make and maintain the embankments, bridges, and works by means of which the railway from Aberystwith to Barmouth and Portmadoc was to be carried across the river Mawddach and the estuary thereof, in such a manner as to render the same available for all purposes of ordinary road traffic, as well as for railway purposes; and the Aberystwith and Welsh Coast Railway Company was by the Act authorized to take certain tolls for the use of the bridge, footway, and works made in pursuance of that Act.

1871

THE QUEEN v. CAMBRIAN RAILWAY CO.

5. The defendants, in pursuance and in exercise of the powers contained in the said Acts, constructed and executed a bridge, footway, and works across the river Mawddach, near to the town of Barmouth, which bridge, footway, and works are on the east of or above the ferry, and at the point where they impinge on the bed of the river are distant from the landing-place of the prosecutor on the south side of the river about 616 yards, and from the landing-places on the north side of the river about 464 yards and 302 yards respectively.

7. The railway is carried across the river by a large viaduct at a considerable height above the surface thereof at high water, and does not touch any portion of the landing-places, nor does it in any way physically interfere with the free passage of the prosecutor's ferry boats, or in any way physically obstruct or impede the prosecutor in his free use of the landing-places or passage of his boats across the ferry and the approaches thereto, either from the river or the land side; but the same and every part thereof are capable of being used by the prosecutor in as full and free a manner as heretofore.

8. The bridge footway and works are and have been, since they were opened by the defendants in or about October, 1867, available, and are and have been since that time used in addition to the railway traffic of the defendants for the passage of passengers on foot, in respect of whom tolls have been and are taken. The transit of horses, sheep, cattle, and carriages is carried on by means of the company's trains, and such horses, sheep, cattle and carriages must get upon their railway at some or one of their stations, the nearest of which on the north side is 778 yards, and on the south about 1300 yards.

9. Since the erection and opening of the bridge footway and works the traffic theretofore using the ferry of the prosecutor has to a very considerable extent fallen off, passengers and owners of cattle, &c., travelling by railway instead of crossing the river in the prosecutors' ferry boats. The chief traffic on the defendant's line comes from a distance along the railway before it reaches the Mawddach.

[The case then set out the proceedings as to arbitration, &c., at length, of which the following summary is sufficient:—]

1871

THE QUEEN v. CAMBRIAN RAILWAY CO.

On the 3rd of May, 1867, the prosecutor gave a notice to the defendants, which, after reciting that, in exercise of the powers of their Acts, the defendants had constructed a bridge and footpath across the river Mawddach (describing the situation with relation to the ferry and landing-places), by the construction of which bridge and footpath the ferry had been injuriously affected, stated that the prosecutor was owner in fee in possession of the ferry, and claimed 1700*l.* compensation by reason of the premises.

In due course the prosecutor appointed an arbitrator, following the terms of the notice; and the defendants also appointed an arbitrator under protest, and the arbitrators appointed an umpire. The umpire proceeded to hear the claim, the defendants appearing under protest, and on the 9th of December, 1867, the arbitrator made his award.

On the 11th of May, 1868, the mandamus issued to the defendants to take up the award, to which the defendants returned that the prosecutor's ferry and his interest therein have not been injuriously affected by the defendants' said works within the meaning of the Lands Clauses Consolidation Act, 1845, and the prosecutor is not entitled to compensation as in the writ mentioned. The prosecutor demurred, and traversed this return, on which issue was joined.

The return was held good on demurrer on the 21st of April, 1869. (1)

The special Acts were made part of the case; they incorporated the Lands and Railway Clauses Consolidation Acts, 1845, but they were not referred to in argument beyond the statement in the case.

The question for the Court was: Has the ferry and the prosecutor's interest therein been injuriously affected by the works of the defendants within the meaning of the Acts of Parliament in that behalf, or by reason of the exercise by the defendants of any of the powers granted by the said Acts, so as to entitle the prosecutor under the provisions of the said Acts to compensation?

It was further agreed that the judgment of the Court of Queen's Bench should be final in the matter.

(1) See Law Rep. 4 Q. B. 320.

1871

THE QUEEN v. CAMBRIAN RAILWAY CO.

Mackeson, Q.C. (*Horatio Lloyd* with him), for the prosecutor. First, an ancient ferry is a franchise, which is an hereditament, and therefore a ferry is "lands" within the Lands Clauses Consolidation Act, which, by s. 3, says "lands" shall extend to "hereditaments of any tenure." Secondly, the erection of this bridge and footway injuriously affected the ferry within the meaning of ss. 6 and 16 of the Railway Clauses Consolidation Act. True, there was no physical obstruction, but that is unnecessary. The cause of action is the injury to the right: *Nicklin* v. *Williams* (1); *Blissett* v. *Hart* (2); *Huzzey* v. *Field.* (3) To support this right it is not necessary that the owner should have any property in the soil: *Peter* v. *Kendall* (4); though a ferry is sometimes appurtenant to land, as in *Reg.* v. *Great Northern Ry. Co.* (5) In that case a verdict of a compensation jury was given for injury to land and ferry, and it was upheld. In the present case nothing can be more direct than the injury caused to the ferry, that is, to the franchise. The injury is not to matter incidental to land, in which case it has been held that compensation cannot be given under the Acts. But the erection of the bridge for the purpose of foot passengers causes a direct and substantial injury to what is the very essence of the right.

Manisty, Q.C. (with him *McIntyre*), for the defendants. It may be conceded that a franchise like a ferry is an hereditament, and so "lands," within the meaning of the Lands Clauses Consolidation Act. But the prosecutor's ferry is not "injuriously affected by the execution of the works" within the meaning of s. 68 of that Act, nor "by the construction of the railway," nor "by reason of the exercise of the powers of the Acts," within ss. 6 and 16 of the Railway Clauses Consolidation Act. The point is concluded by two decisions of the House of Lords, in *Ricket* v. *Metropolitan Ry. Co.* (6), and *Brand* v. *Hammersmith Ry. Co.* (7) Conceding that an action might lie at common law against a person who erected and allowed a bridge to be used by the public so as to divert the traffic from an ancient ferry, the builder merely of a bridge would

(1) 10 Ex. 259, 267; 23 L. J. (Ex.) 335, 337.
(2) Willes, 508, 512, n.
(3) 2 C. M. & R. at pp. 440–441.
(4) 6 B. & C. 703, 710.
(5) 14 Q. B. 25; 19 L. J. (Q.B.) 25.
(6) Law Rep. 2 H. L. 175.
(7) Law Rep. 4 H. L. 171.

not be liable. It is the user which causes the injury, and is the foundation of an action for disturbance of the ferry. That, for injury caused by the user, as distinguished from the construction of the bridge, no compensation can be awarded under any of the above sections is directly decided by *Brand's Case* (1), and it was also assumed by all the Lords in *Ricket's Case.* (2)

[COCKBURN, C.J. There the injury was only, as it were, incidentally caused. Here the direct object of constructing the bridge and footway was to divert the traffic from the ferry.]

The object of the making of the railway in *Brand's Case* (1) was as direct, to use it for running trains.

Mackeson, Q.C., in reply. Blackburn, J., was the only judge whose opinion in *Brand's Case* (1) was in conformity with the judgment of the House of Lords, and there is nothing, in his opinion, or the judgments of the majority of the Lords, to extend it to a case like the present, where the injury is so directly caused by the construction of the railway. *Ricket's Case* (2) is altogether distinguishable from the present, the ground of the decision being that the diversion of the traffic so as to deprive a house of customers was no injury at common law. Here it cannot be doubted that the disturbance of an ancient ferry is an actionable wrong.

COCKBURN, C.J. I am of opinion that our judgment should be for the prosecutor. The 6th section of the Railway Clauses Consolidation Act, read by the light of the interpretation clause, s. 3 of the Lands Clauses Consolidation Act, makes the owner of any hereditament which is injuriously affected by the construction of a railway entitled to compensation. I think there can be no doubt that a ferry, being a franchise, is an "hereditament." Lord Coke says: "An hereditament is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be inherited, be it corporeal or incorporeal, real, personal or mixed" (3); and Blackstone, in the chapter on incorporeal hereditaments (4), amongst the various descriptions which he enumerates, mentions "franchises." That a "ferry"

(1) Law Rep. 4 H. L. 171.
(2) Law Rep. 2 H. L. 175.
(3) Co. Lit. 6 a, as cited in 2 Bl. Com. p. 17.
(4) 2 Bl. Com. ch. 3, p. 21.

1871

THE QUEEN v. CAMBRIAN RAILWAY CO.

is a "franchise" there can be no possible doubt; and therefore a ferry would come within the term "lands" as used in the statute.

But then the question is whether, according to the decision of the House of Lords in the two cases which have been cited (1), compensation can be awarded in such a case as the present; or whether the reason upon which the defendants have contended that it cannot, viz., that it is not by the mere construction of a railway and a bridge which the company have been authorized to construct, but by the *use* of that bridge that the prosecutor's right to this ferry has been injuriously affected, ought to prevail. I think this case is distinguishable from the two cases in the House of Lords upon which Mr. Manisty based his argument; and I must say, that while I should consider myself bound to give full effect to the principle of those decisions in a case to which it is strictly applicable, I am not prepared to carry that principle any further than I am necessarily compelled to do. I must say that I have never been able to bring my mind to understand how, when some work is executed under the powers of an Act of Parliament, which, if executed by a private individual, without parliamentary powers, would have been actionable, as productive of injury to another, in whatever way the injury may arise, it can be said to be consistent with common justice that the party injured should not be entitled to compensation. I lament that either the legislature has not gone further in the way of awarding compensation in cases to which it most undoubtedly ought to be extended, or that so narrow a construction should have been put upon the terms which the legislature has thought fit to use. Nevertheless, we must implicitly follow the decision of the House of Lords where it necessarily applies. But I do not think it does apply in this case, and for this reason: It seems to me that the only way in which one can interpret the language of the learned Lords who formed the majority in the decision in those cases in the House of Lords, is, that, while the Act of Parliament secures compensation wherever property is corporeally or actually touched and affected by the construction of the railway, yet that to things that are

(1) *Ricket* v. *Metropolitan Ry. Co.* *Hammersmith Ry. Co.* Law Rep. 4 H. Law Rep. 2 H. L. 175; *Brand* v. L. 171.

simply incidental to the ownership or possession of the property, in the way of additional advantage or enjoyment, the compensation given by the statute does not extend. But in the present instance we are dealing with that which is not merely incidental to some other right of property, and accessory to it, but with that which is of the very essence of the property itself. We are not dealing with something accessory and incidental to the possession and ownership, but with that which constitutes the very hereditament itself. Here, the franchise of conveying people by this ferry, and of taking toll in consideration of the services thus rendered to the public, is the very thing itself, which the construction of this bridge, by the opportunity thus afforded to the public of evading the use of the ferry, of necessity, not only injuriously affects, but practically destroys. It leaves, no doubt, the right to the owner of keeping his boat; it leaves him the right of ferrying across the river such passengers as choose to go, and taking the toll for the service thus rendered; but it entirely annihilates the value of the franchise of the ferry, because if the public have a bridge to go over by, they will not go by the ferry. Therefore what the legislature has authorized to be done is not something which affects the property incidentally and remotely, or in a secondary point of view, but which affects the very body of the property itself.

I agree with the distinction taken by Mr. Mackeson, that the franchise here is of the very essence of the thing, and which one cannot say is accessory to anything else; it is the very life and body of it, which the railway company, by erecting this bridge, at once attacks and affects injuriously. I think, therefore, for this reason, that the cases are distinguishable, and I am very glad to think that we can, upon that distinction, do justice in this case, by awarding to the man who has had his franchise thus injuriously affected the compensation, to which, in point of natural justice, he is undoubtedly entitled.

BLACKBURN, J. I am of the same opinion. The parties, so far as regards their own interests, have very sensibly and judiciously agreed that the decision of this Court should be final; but I regret that we should have to decide so important a case finally without our decision being subject to review. I come to the conclusion

1871

THE QUEEN v. CAMBRIAN RAILWAY CO.

1 Q.B.D. 114, 118

that the prosecutor is entitled to compensation; and though I so decide, I do not disregard the decision in the case of *Brand* v. *Hammersmith Ry. Co.* (1) in the House of Lords. The prosecutor's right is to a ferry, or franchise, by which he had the exclusive right of carrying passengers across the river. It is well established that if that right is interfered with, without the authority of an Act of Parliament, by something which carries passengers across so close to it as to disturb the right, an action would lie for that disturbance. The cases, so far as I remember them, in which actions have lain for the interference with, or disturbance of, the right of ferry, have been where there has been a carrying across by boats. But I cannot bring my mind to doubt the principle that if a bridge were to be erected across a ferry, and people were to go across the bridge, and consequently the bridge would have the effect of disturbing the owner of the ferry in his right, he would be entitled to bring an action on the case, and to recover damages. It follows, I think, that what the railway company have here done, not only in making a bridge for carrying railway traffic across but actually a footway, and taking toll from foot passengers for passing from one side to the other, if that had not been authorized by Act of Parliament, would have been a disturbance of the ferry, for which the owner of the ferry could have brought an action on the case. But the legislature have thought proper in the defendants' Railway Act to enact that this may be done, and this foot-bridge may be made across. Thus the question comes to be whether the words of the Act of Parliament giving compensation are sufficient to give compensation in such a case as this. Now those words are, that compensation may be given to the owner for any damage to lands injuriously affected by the construction of the railway or the execution of the works. The interpretation clause is that "lands" shall include "hereditaments." Hereditaments are defined by Lord Coke, in that passage which my Lord has read, to include all things that would descend to the heir, corporeal or incorporeal, and there is no doubt that this kind of franchise is a franchise which would descend to the heir, and is an hereditament. We must read the Act, therefore, as if the word "lands" had been used in the extended way in which

(1) Law Rep. 4 H. L. 171.

1871

THE QUEEN v. CAMBRIAN RAILWAY CO.

the interpretation clause uses it, namely, "lands, franchises, and ferries injuriously affected by the execution of the works." At first I doubted whether "hereditament," which was brought in in that way, was not something that more nearly resembled "lands," but, on reflection, I think the word "hereditament" used in the Act is used in its full acceptation, namely, that wherever the execution of the works injuriously affects anything which is the subject of inheritance, compensation is to be given.

But then we come to the construction of the other words that are inserted here, namely, "by the construction of railway" or "the execution of the works." Now in the case of *Brand* v. *Hammersmith Ry. Co.* (1) the claim was this: railway works were erected, and for all that was done in making the railway, in the strict sense of the term, compensation had been paid, but further, the company in the exercise of the powers given by s. 86, constructed works whereby the trains produced some vibration and noise, and the question was whether Brand, the plaintiff, could for that recover compensation. The determination of the House of Lords, which was ultimately come to by a small majority after very much discussion, has apparently fixed the law, as far as it goes; and that determination was, that compensation could not be given, for the user of the works, by the running of the trains and so forth, and that compensation did not extend to that case.

But when we come to look at the present case, we see the nature of the injury to the ferry is such that it cannot be properly and strictly said to be arising merely from the user of the works, in the sense in which it was supposed damage was done to Mr. Brand's house. It is very true, as Mr. Manisty argued, that in a strict sense of the words, an action for the disturbance of a ferry would not have lain for merely building a bridge, but would only have lain where special damage was shewn, namely, where it was shewn that people used it to cross the river instead of using the ferry, and the cause of action in that sense for the disturbance of the ferry would not arise until people came to use the bridge. But then I cannot help thinking that here the very essence of what the legislature authorized, namely, the building of the bridge, was for the express purpose of taking passengers across, and, thereby most inevitably

4 PC 118

(1) Law Rep. 4 H. L. 171.

1871

THE QUEEN v. CAMBRIAN RAILWAY CO.

disturbing the enjoyment of the ferry. I think that is as much an injury to the ferry by the mere erection of the bridge, as if the legislature had directed that so much of the ferry as regarded the passengers who crossed the bridge should be taken away at once. I think that is really what it amounts to in effect, and I think the injuriously affecting the ferry was by the construction of the works.

In *Brand* v. *Hammersmith Ry. Co.* (1), when in the Exchequer Chamber, Channel, B., points out the distinction. He says, "Is an injury by the running of trains, which could not happen unless the railway had been previously constructed, an injury by the construction? I do not think, according to the doctrine adopted by our Courts, where they have to decide whether one thing is caused by another, that it is so. The maxim, 'Causa proxima et non remota spectatur,' seems to apply. I can no more say that this damage by the running of the trains is caused by the construction of the line, than I could that the death of a man run over on the line was caused by its construction. It could not have taken place without it, but that is not enough." I think, however, in the case which is now before us, as I have already pointed out, the damage to the ferry was caused by the construction of the bridge. The very object and essence of what the legislature intended, was, partly, to give a benefit to the railway company, and partly, no doubt, to give a benefit to the public, so that they might be able to pass from side to side in a far more convenient way than by the old ferry; but no doubt the object was to enable the defendants to take away the franchise and exclusive right, and to enable the public to pass by that bridge. Whether or not that was an object for which compensation was intended to be given, is another question; but it is the very object of the Act that they should erect a bridge which should be so used by passengers as to greatly diminish in value, if not to take away, the best part of the proprietor's right of franchise in this ferry. That being so, I cannot but think that the injury to the ferry was, according to the reasoning of Channel, B., not caused remotely by the erection of the bridge, but that the works themselves were the immediate cause of it. It is always very difficult to see where the boundary lies, where remoteness commences and immediate cause ceases. I think in this case that

(1) Law Rep. 2 Q. B. at p. 238.

1871

THE QUEEN v. CAMBRIAN RAILWAY CO.

the erection of the bridge was the immediate cause of the injury to the ferry, and consequently, without in the slightest way infringing on the decision of *Brand* v. *Hammersmith Ry. Co.* (1), I think the prosecutor is entitled to compensation.

Judgment for the prosecutor.

Attorneys for prosecutor: *Venning, Robins, & Venning.*
Attorneys for defendants: *Milne, Riddle, & Mellor.*

[IN THE EXCHEQUER CHAMBER.]

May 10.

ARNOLD *v.* BLAKER AND ANOTHER.

Highway—Limited Dedication—Right of Owner of Soil to Plough up Footpaths.

The plaintiff was the occupier of an arable field, across which a footway from time immemorial had been used by every person at his pleasure; but the plaintiff and his predecessors had also from time immemorial ploughed up the footway when and in such parts as they thought fit, and in other parts lifted the plough across it. The defendants were surveyors of highways, and in order to repair the footway placed materials on it, making it a hard causeway, so as to prevent the plaintiff from ploughing it up:—

Held, that the footway was a highway, which it must be assumed had been dedicated to the public subject to the condition that the owner of the soil might plough it up, and that there could at law be such a limited dedication; and that the defendants were therefore liable for the trespass.

Mercer v. *Woodgate* (Law Rep. 5 Q. B. 26) affirmed.

APPEAL by the defendants from the decision of the Court of Queen's Bench, making absolute a rule to enter a verdict for the plaintiff on the 5th plea.

Trespass for breaking and entering a close of the plaintiff and constructing a road thereon.

Plea, amongst others, 5: That the defendants were the surveyors of the highways of the parish of Portslade, duly appointed under the statute in that behalf; and that there was, and of right ought to have been, a common and public highway over the land in which, &c., for all persons to go and return on foot at all times of the year at their free will and pleasure; and which public highway the parish of Portslade was then bound from

(1) Law Rep. 4 H. L. 171.

Sir Arnold v. Holbrook. 14 W. R. C. B. 96 when I was told that in the absence of any presumption right to the public has no right in the event of the foot path becoming impassable to pass over the

1871

ARNOLD v. BLAKER.

time to time and at all times when need should be, to repair and keep in repair; and that the highway was founderous and out of repair, and that there was then need to repair the same. Wherefore the defendants, as such surveyors, in order to repair the highway necessarily committed the several trespasses.

Issue thereon.

New assignment, that the plaintiff sued for trespasses committed by the defendants for a longer time and to a greater extent than was necessary for the purposes in the 5th plea mentioned.

Pleas to the new assignment: 1. Except as to so much thereof as complains of trespasses committed to a greater extent than was necessary, not guilty. 2. As to so much of the new assignment as relates to the trespasses committed to a greater extent than was necessary, payment of 20*s.* into court.

Joinder of issue on plea to new assignment. 2. Replication that the sum paid into court is not enough.

At the trial before Bramwell, B., it appeared that the plaintiff was the tenant and occupier of an arable field in the parish of Portslade, in the county of Sussex, across which was a footway, which from time immemorial had always, at all times of the year, been used by all persons as of right to go and return thereon on foot, at their own free will and pleasure. But the plaintiff and his predecessors had, also, from time immemorial, in ploughing the field, ploughed up the footway when and in such parts as they thought fit, and in other parts lifted the plough across it. When they ploughed through it, they remade the path by turning a furrow on each side and flattening down the surface between the furrows.

The defendants were surveyors of the highways of the parish of Portslade, under the statutes in that behalf, and committed the trespasses as to which the 5th plea is pleaded in order to make or repair the footway, which, at the time of the committing of the trespasses, was said by them to be founderous and in need of reparation; but previous to these repairs being made, the footway had never been made or repaired by the surveyors of the highways.

The footway was repaired pursuant to a resolution passed at a vestry meeting of the inhabitants of the parish. The materials

1871

ARNOLD v. BLAKER.

used for repairing the footway were chalk and coombe rock and shingle, which were materials proper to be used for the making the footway a hard causeway. If the defendants were justified in making or repairing the footway in such a manner as to prevent the plaintiff from ploughing the same, or lifting his plough and harrow over the footway, the repairs actually done were reasonably and properly done on the footway, and were necessary and not in excess of what was requisite for the purpose. The width of the footway, as repaired, was not greater than the public were entitled to have.

Persons using the footway had been frequently compelled, in consequence of the bad state of parts of the path in wet weather, to deviate from it, and walk over other parts of the plaintiff's land, and thereby widened the track to an extent in some places of from fifteen to twenty feet, and trod down the plaintiff's crops growing on each side of the proper footway.

The effect of the repairs done by the defendants was to make the footway so hard and so high as to render it impossible for the plaintiff either to plough through it or lift his plough or harrows over it as easily as formerly.

The jury found that any path which prevented the plaintiff from ploughing through it as formerly would be a prejudice to him and not a benefit.

The money paid into court upon the new assignment was sufficient to cover all damages recoverable under the new assignment.

The learned Judge directed a verdict to be entered for the defendants on the issue raised by the 5th plea, and on pleas to the new assignment, but gave leave to the plaintiff to move to enter a verdict for him on the issue on the 5th plea, if the Court should be of opinion on the facts proved, or to be inferred therefrom by the Court that he was entitled to it.

A rule was accordingly obtained to enter a verdict on the 5th plea, on the grounds, first, that the defendants failed to establish any such issue as is set up by the 5th plea; secondly, that the evidence established only a partial or limited right on the part of the public to use the footpath, such right being subject to the plaintiff's right to plough through and over the footway where he thought fit, or at necessary and convenient seasons.

1871

ARNOLD v. BLAKER.

This rule the Court of Queen's Bench made absolute, on the authority of *Mercer* v. *Woodgate* (1).

Prentice, Q.C. (*Lord* with him), for the defendants. There cannot be at law a dedication of a footpath with a right to plough it up; in such case the dedication would be inconsistent with the grant of the highway. A man cannot dedicate a way with a reservation that the grantee shall not repair it; if he did, the reservation would be void, and the grant good. It is conceded that there can be a partial dedication of a way to the public; but this case is in the nature of a qualified dedication, subject to a power of resumption by the grantor. There can be no such qualified dedication; because it would be inconsistent with a grant. In *Fitzpatrick* v. *Robinson* (2) it was decided that, in a grant of a strand or waste adjoining a river to the public, the grantor could not reserve to himself the right to make and enclose quays on the bank. In *Blundell* v. *Catterall* (3) it is clear from the judgment of Abbott, C.J., that in a grant to the public of any advantage the grantor cannot reserve to himself the right to resume at pleasure the full enjoyment of his land. In Bac. Abr., Conditions L, it is laid down: "A condition upon a feoffment in fee not to alien is void, because it is repugnant to the estate. So if a condition upon a feoffment in fee that his daughters shall not inherit; for this is repugnant to the estate, and an attempt to establish a different kind of inheritance than is allowed of by law." Also, in Com. Dig. Condition (D. 5) it is said: "So if a condition upon a feoffment be repugnant to the nature of the estate; as a feoffment upon condition that a feoffee shall not alien the estate, the estate is absolute and the condition void." Here a highway is granted to be enjoyed without obstruction, the right to plough it is repugnant to the grant, and void. Indeed, to plough up the highway is a nuisance. In *Reg.* v. *Charlesworth* (4) Lord Campbell, C.J., says: "It is argued that a right has been reserved by the landowner to make as many rail and tramroads as he pleases, in all time to come, for the convenient use of his pits; but if this would be a nuisance there could be no such right reserved." A custom to erect booths on a highway

(1) Law Rep. 5 Q. B. 26.
(2) 1 Hud. & Brooke, 585.
(3) 5 B. & A. 268, 315.
(4) 16 Q. B. 1012, 1020.

during a fair, leaving open a sufficient part of the highway for passage, was held reasonable; not on the ground that public rights could be limited for a private benefit, but on the ground that a fair was a public convenience, and that a benefit arose from the accommodation afforded to the persons frequenting the fair: *Elwood* v. *Bullock* (1). The grantee is bound to repair the thing granted: *Robins* v. *Jones* (2). The defendants, who are surveyors of highways, have done no more than their duty in repairing the highway: *Rex* v. *Leake* (3). A question similar to the present was raised in *Mercer* v. *Woodgate* (4). That is a very recent decision, and the only case which is to be found to support the right set up on behalf of the defendants; it was on the authority of *Mercer* v. *Woodgate* (4) that this case was decided; it is, however, not binding on the Court of Exchequer Chamber.

Pollock, Q.C. (*Grantham* with him), for the plaintiff, was not heard.

KELLY, C.B. The judgment of the Court of Queen's Bench must be affirmed. A similar question to the present was decided in *Mercer* v. *Woodgate* (4), and it is on that authority that this case was decided in the Court below; it must be considered therefore that this is in the nature of an appeal from that decision. The principles, however, which govern the present question have long been settled. The plaintiff was the occupier of a field through which is a footpath, over which, from time immemorial, the public had a right of way, subject to the right of the owner of the soil, also from time immemorial, to plough up the footpath, and for a short time to some extent to interfere with the free user of it. The question is whether a restriction which derogates so much from the benefit conferred upon the public can be attached to the dedication of a highway. No doubt if such a reservation were inconsistent with the legal character of the dedication it would be void. In *Elwood* v. *Bullock* (1) the interruption to the right of way, although a more injurious interference with public convenience than in the present case, was held not to be inconsistent with the dedication. The right to plough up the footpath, and thereby

(1) 6 Q. B. 383.
(2) 15 C. B. (N.S.) 221.
(3) 5 B. & Ad. 469.
(4) Law Rep. 5 Q. B. 26.

1871

ARNOLD v. BLAKER.

temporarily to interfere with the user of it by the public, is reasonable, and is not inconsistent with the dedication. The reservation of the right to plough up the footpath is not so injurious as some other reservations might be; as, for instance, the reservation of a right to cut a channel across a highway in time of flood. In the present case, therefore, I think the reservation is quite consistent with the dedication, and that, consequently, the plaintiff is entitled to have a verdict entered for him upon the 5th plea.

BRAMWELL, CHANNELL, and PIGOTT, BB., and BYLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Judgment affirmed.

Attorney for plaintiff: *E. M. Hore.*
Attorneys for defendants: *Palmer, Palmer, & Ball.*

May 4.

PELLAS *v.* BRESLAUER.

County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—*Costs—Action commenced in Inferior Court, and removed by Certiorari.*

Sect. 5 of the County Courts Act, 1867, enacts that, "if in any action commenced after the passing of this Act in any of the superior courts of record the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the Court, or a judge at chambers, shall by rule or order allow such costs":—

Held, that this section applies to an action commenced in an inferior court and removed into a superior court by certiorari on the application of the defendant.

RULE calling upon the plaintiff to shew cause why the master should not be directed to review his taxation and disallow the plaintiff's costs of suit.

The action was commenced in the Mayor's Court on the 20th July, 1870, the plaintiff's claim being, under the first count, which was in contract, 100*l.*, and under the second, which was in detinue, a return of the goods and 100*l.* damages. On the 12th August, 1870, the defendant obtained an order whereby the cause was removed into this Court by certiorari. At the trial before Cockburn, C.J., at the London sittings after Hilary Term, the plain-

tiff, who had previously abandoned a part of his claim, recovered a verdict for 3*l*.

No certificate was obtained from the judge; nor any rule or order for costs.

The Master on taxation allowed the plaintiff the costs of suit. A summons was taken out at Chambers before Lush, J., to direct the master to review his taxation and disallow the defendant's costs. The learned judge made no order. The present rule was thereupon obtained.

R. E. Webster (*Philbrick* with him) shewed cause. (1) The plaintiff is entitled to his costs unless he is deprived of them by s. 5 of the County Courts Act, 1867. (2) But the words at the beginning of the section, "any action commenced after the passing of this Act in any of Her Majesty's Superior Courts," expressly limit its application to actions commenced in a superior court. It has no bearing upon an action commenced in an inferior court and removed to the superior court by certiorari, as this was. To put any other meaning upon the section would be a forced and unnatural construction. And the last clause of the section shews the same thing. The mode in which a plaintiff is to get his costs is by a certificate "that there was sufficient reason for bringing such action in such superior court." "Bringing" and "commencing" must mean the same thing. The whole section must, therefore, be limited to actions commenced in a superior court.

A. L. Smith, in support of the rule, was not called upon.

BLACKBURN, J. I am of opinion that this rule should be made absolute. Looking at the object and meaning of the whole section, I think the word "commenced" is to be read only with those which immediately follow it, namely, "after the passing of this

(1) In the Bail Court before Blackburn and Hannen, JJ.

(2) 30 & 31 Vict. c. 142, s. 5, enacts that "if in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of Record the plaintiff shall recover a sum not exceeding 20*l*. if the action is founded on contract or 10*l*. if founded on tort, whether by verdict, judgment by default, or on demurrer or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the Court or judge at Chambers shall, by rule or order, allow such costs."

1871

PELLAS v. BRESLAUER.

Act," and that it has reference only to time. Thus read, the section would run: "If in any action, the commencement of which is after the passing of this Act, in any of Her Majesty's Superior Courts, the plaintiff shall recover, &c."

But it is further said that, as this action was not brought in a superior court, the judge could not certify that there was sufficient reason for bringing it there, so as to give the plaintiff a right to his costs. But the certificate on the record is not the only mode in which, under the section, a plaintiff can get his costs. The Court or a judge may, by rule or order, allow them. And if this were a proper case for such a rule or order the plaintiff ought to have obtained it. No doubt, the fact that a case has been removed into the superior court by the defendant might, in many cases, be a strong reason for allowing the plaintiff his costs; but without a rule or order doing so, the Master ought not to tax the costs.

My opinion that this is the true construction of the section, is very much fortified by the fact, that in s. 11 of 13 & 14 Vict. c. 61, by which, as by the present section, a plaintiff recovering less than a certain sum was deprived of his costs, the words used were precisely similar, "if in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of Record, the plaintiff shall recover, &c." Yet it was thought necessary to make express provision by s. 13 for the case of an action removed by certiorari, to enable the plaintiff in such case to get his costs.

HANNEN, J. I am of the same opinion. I think the object of the section was to define the cases in which a plaintiff recovering less than the prescribed amount should be entitled to his costs. It is only necessary to read the words, "commenced after the passing of this Act," as if in a parenthesis, and the section then applies to all actions in the superior courts, however they may have got there, whether originally commenced there or brought there by certiorari. And as to the latter words of the section, which say that the plaintiff is to have his costs if the judge certifies on the record that there was sufficient reason for bringing the action in the superior court, they apply only where the action has been so brought. If it has not been, of course no such certificate can be obtained. The plaintiff must then take advantage of the other modes

of getting costs provided by the section; he must obtain a rule or order allowing them. No doubt the fact that the case had been removed by certiorari would be a very material one in determining whether such a rule or order ought to be made. But it does not dispense with the necessity for it.

1871

PELLAS v. BRESLAUER.

Rule absolute.

Attorneys for plaintiff: *Lowless, Nelson, & Jones.*
Attorneys for defendant: *Ellis & Crossfield.*

GARLAND *v.* MEAD AND OTHERS.

April 28.

Devise of Copyholds—Effect of Wills Act (7 *Wm.* 4 *&* 1 *Vict. c.* 26) *s.* 3.

The effect of s. 3 of the Wills Act (7 Wm. 4 & 1 Vict. c. 26) is to enable a copyholder to devise his estate in every case, dispensing with a surrender to the use of the will, but leaving the estate in the customary heir till the admittance of the devisee.

Where, therefore, a copyholder devised his estate to two trustees, appointing them guardians of his customary heir who was an infant, and the devise was entered on the court rolls, and after proclamations the trustees, who had not disclaimed the devise, did not come in to be admitted, but tendered the infant heir for admittance, and the lord refused to admit him on the ground of the devise:—

Held, that the lord could not seize quousque for want of a tenant.

CASE stated by consent, in an ejectment to recover certain copyhold messuages and lands in the manors of Wrabness and Wix Park Hall, in the county of Essex.

The defendants defended for the whole premises.

The plaintiff is the lord of the said manors.

Edward Thomas Busk died on the 19th of January, 1868, seised of all the said copyhold hereditaments and tenements, to which he had been admitted in his lifetime. By his will dated the 22nd of November, 1852, he devised all his manors, messuages, lands, tenements, and real estate of every tenure to the use of Henry William Busk, Hans Busk, and Edward Henry Busk, upon certain trusts, and thereby appointed his widow Susannah Busk and the said three trustees, guardians of his infant children.

Hans Busk by deed of the 17th of March, 1868, disclaimed the devise, trusteeship, and guardianship.

1871

GARLAND v. MEAD.

According to the custom of the manors the youngest son is customary heir to hereditaments held of the lord.

At the death of the testator, William Gould Busk his youngest son and customary heir was, and still is, an infant under the age of twenty-one years.

Henry William Busk and Edward Henry Busk duly proved the will, and have not disclaimed the said devise.

At courts baron holden for each of the manors respectively on the 19th of June, 1868, the homage respectively presented the death of the testator, and the first proclamation was duly made for the person entitled to the customary or copyhold hereditaments of which the testator died seised to come into court and be admitted, and no person came. At courts baron holden for each of the manors respectively on the 18th of December, 1868, the second proclamation was duly made and no person came. At courts baron holden for each of the manors respectively, on the 11th June, 1869, the homage respectively presented an official extract from the will of Edward Thomas Busk, whereby it appeared that he had devised his copyhold hereditaments holden of the said manors respectively of which he had died seised, to Henry William Busk, Hans Busk, and Edward Henry Busk, and at the said courts respectively, the third proclamation was made.

At the said last mentioned courts respectively, William Gould Busk was tendered by his guardian Edward Henry Busk, for admittance as customary heir to the said copyhold hereditaments; but the lord of the manors refused to admit him, by reason of the devise of the hereditaments contained in the will.

The devisees not having appeared at the courts baron respectively to claim admittance, precepts were awarded to the bailiffs of the manors respectively, to seize the hereditaments into the hands of the lord, for want of a tenant.

By virtue of the precepts the hereditaments were in the ordinary way seized by the bailiffs of the manors into the hands of the lord on the 7th of February, 1870; but the defendants refused to attorn to the lord; and accordingly the present action was commenced.

There is no special or peculiar custom in either of the manors relating to the admittance of a surrenderee or devisee.

The fine on the admittance of the two trustees would have been a double fine or a fine and a half, instead of a single fine on the admittance of the heir.

The question for the opinion of the Court was, whether the plaintiff is entitled to recover, the devisees not having presented themselves for admittance.

Manisty, Q.C. (*Herschell* with him), for the plaintiff. The effect of s. 3 of the Wills Act, 7 Wm. 4 & 1 Vict. c. 26 (1), is that a

(1) 7 Wm. 4 & 1 Vict. c. 26, by s. 1, repeals, inter alia, 55 Geo. 3, c. 192.

S. 3: "It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate, and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary, or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by the will if this Act had not been made, or notwithstanding that the same in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; . . ."

S. 5: "When any real estate of the nature of customary freehold, or tenant right, or customary or copyhold shall be disposed of by will, the lord of the manor, or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services, as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent."

1871

GARLAND v. MEAD.

devise passes the estate in a copyhold direct to the devisee in the same way as a freehold, subject only to this, that the devisee is bound to come in and be admitted tenant on payment of the accustomed fine. In other words, the devise divests the estate of the heir and vests it at once in the devisee without admittance. The Court has already, in this very case, refused to compel the lord to admit the heir: *Reg.* v. *Garland* (1). No doubt the old Act 55 Geo. 3, c. 192, s. 1, only dispensed with an actual surrender to the uses of the will, supplying what has been termed an ideal surrender, though the intention was to have given a larger effect to it (see 1 Watkins on Copyholds, 4th ed. p. 202); but this has now been done in the Wills Act, s. 3, which is in much larger terms than the old Act, and makes it "lawful for every person to devise, bequeath, or dispose of by will" executed as required by the Act, "all real estate . . . which if not so devised *would devolve upon the heir-at-law*. . ." The latter clause shews that the effect intended is to divest the heir. This is further shewn by s. 5, which enacts that the same fine shall be payable by the devisee on admittance, as by the heir, and gives the lord the same power of enforcing the fine against the devisee as against the heir; that is, by seizing quousque if he will not come in. No doubt this part of s. 5 applies only to manors where there was no custom to devise; but it shews that the effect of the devise under s. 3 was to divest the heir of all estate and make him a stranger; for if the heir could still come and claim to be admitted, how could the lord enforce the fine against the devisee by seizing quousque, when he had already a tenant in the heir? *Paterson* v. *Paterson* (2), will be cited by the other side, in which the Master of the Rolls says he is "rather disposed to think that in substance the copyhold descends to the heir subject to the right of the devisee to be admitted;" but that is a mere dictum and unnecessary for the decision of the case.

Joshua Williams, Q.C. (*A. L. Smith* with him), for the defendants. The Wills Act does no more than the 55 Geo. 3, c. 192 did, viz., dispense in all cases with the necessity of a surrender to the uses of the will: s. 3 was simply intended to re-enact s. 1 of the old Act, with the important addition of extending the power of devise to all manors; but there was no intention of interfering with or

(1) Law Rep. 5 Q. B. 269.

(2) Law Rep. 2 Eq. 31, 36.

altering the relation between the lord and his tenant. If the estate passes by the devise the whole law of copyholds has been altered; for the devisee could not maintain ejectment before admittance, though the heir might: *Doe* v. *Crisp.* (1) *Reg.* v. *Garland* (2) is no decision against the defendants; the Court refused to assist the heir, but the majority of the Court expressed their opinion in favour of the estate not passing to the devisee, but only the right to admittance. This is the general view of the profession. In the 3rd ed. of Jarman on Wills, vol. 1, p. 54, it is said of the Act that "it repeals 55 Geo. 3, c. 192, which only supplied a surrender, and makes the will itself, without any surrender, confer a right to admittance, notwithstanding the want of a custom." This is shewn by several equity cases in which that view has been assumed. Thus, in *Glass* v. *Richardson* (3), Turner, V.C., says: "The will of a copyhold tenant, as I apprehend, is nothing more than a direction to the lord as to the person who is to be admitted into the tenancy." And again: "But what is the effect of the devise? Only, as I apprehend, to give the devisee a right to be admitted; just as in the case of a mere power to sell, the heir may be admitted before the authority is exercised." In the same case when before the Lords Justices (4), Lord Cranworth, L.J., says: "A testator disposing of a copyhold by his will does no more than name the person whom the lord will admit. . . . All that the lord can insist on is, that he shall never be without either a tenant or the possession of the land, and this is effectually secured to him by his right of seizing the land, quousque, upon the death of the tenant, unless the heir, or some one claiming under the testator's will, comes in and is admitted." So, again, in *Steele* v. *Waller* (5) there was a devise of a copyhold to trustees for certain purposes, and they sold it to the plaintiff, who was admitted on the surrender of the heir-at-law; and it was held that the plaintiff had both the legal and equitable title, although to make a complete title there must be a release of the trustees' bare right to be admitted. No argument can be derived from s. 5 in favour of the plaintiff's view of s. 3; it was necessary to confer the right on the lord against

(1) 8 A. & E. 779.
(2) Law Rep. 5 Q. B. 269.
(3) 9 Hare, at pp. 701, 703.
(4) 2 D. M. & G. 658, 662.
(5) 28 Beav. 466.

1871

GARLAND v. MEAD.

the devisee in manors in which, as there was no custom to devise, there could be no customary devisee. Again, if the devise was intended by s. 3 to pass the estate to the devisee, it would have been unnecessary to give express power, as the section does, to a devisee to devise without admittance. The true effect of s. 3 is simply to give the copyholder, in all cases, power to bequeath the right to be admitted, leaving the estate, exactly as before the statute, in the heir until the admittance of the devisee.

Manisty, Q.C., in reply. Although the statute has been passed so long, there is no decided opinion expressed in the text books as to the construction of s. 3: see Scriven on Copyholds, 5th ed. p. 152. Neither are any of the cases cited decisive of the point. In *Glass* v. *Richardson* (1), there was a devise of copyholds to such uses as A. and B. should appoint, and subjected thereto to the use of A. and B. and their heirs for ever, on certain trusts. A. and B. sold the copyhold in pursuance of the trust, and it was held that they could make a good title without being admitted; in other words, that the plaintiff, the vendee, as nominee of the trustees, had a right to be admitted. The decision would have been precisely the same, whether the devise divested the heir-at-law of the estate or not. Again, in *Steele* v. *Waller* (2), the point *decided* was, that the purchaser had not a good title without a release by the trustees of their right to be admitted; and the Master of the Rolls' judgment is no authority for the defendants' proposition.

[BLACKBURN, J. He certainly says: "Then there is a specific devise of the property, and therefore the legal estate in it passed to the devisees in trust under the will. I do not understand that these trustees have disclaimed the devise or the trusts, and, if so, the customary heir took nothing in the estate by descent." But then he goes on to say, that if the devisees did not present themselves, the heir had a right to be admitted, and that the admittance conferred on him the legal estate.]

The true intention of the Act is that expressed by Lush, J., in *Reg.* v. *Garland* (3), viz., "to remove all existing obstacles to the free transfer of property, and to put all kinds of property on the same footing as freehold estates; and in order to facilitate this

(1) 9 Hare, 698; 2 D. M. & G. 658. (2) 28 Beav. 466, 469.
(3) Law Rep. 5 Q. B. at p. 274.

devolution of property, s. 3 intended to make a will a direct conveyance of copyhold estate, just as of freeholds; so that by a devise of copyholds the customary heir would be entirely and at once deprived of all title and interest, and the devisee put in his place, though admittance of the devisee, just as of the heir, would still be necessary to complete the legal title."

COCKBURN, C.J. I am of opinion that our judgment must be for the defendants. It is quite clear that under the old law a copyhold tenement could only be made the subject of testamentary disposition by a surrender by the testator to the use of his will: and originally there must have been an actual surrender. A change was made in the law by 55 Geo. 3, c. 192, the effect of which was to substitute what has been well called an ideal surrender for an actual surrender. The Wills Act (7 Wm. 4 & 1 Vict. c. 26) repealed the Act of Geo. 3, and substituted new provisions. I was at first disposed to think that by s. 3 more had been done than, on subsequent consideration, I think, was effected. And without giving undue weight to it, I cannot but be impressed by the fact that the case of *Glass* v. *Richardson* (1) shews that the point Mr. Williams contended for was assumed on all hands, and that this assumption was the ground of the decision. But independently of that, upon looking at s. 3, I agree with the construction Mr. Williams has contended for: that the effect of this section is merely to substitute an ordinary devise for the more cumbrous proceedings of the old law, and was not intended to affect the rights of parties standing in the relation of lord and tenant. That being so, we have to look at the position of the parties in this case. The testator devises, under the Statute of Wills, all his copyhold tenements to trustees upon certain trusts; and the trustees refuse to come in and be admitted, on the ground that, if they do, they will have to pay a fine and a half, whereas the heir will only have to pay a single fine. The first question is, whether the lord might admit the heir. As I have said, I think he might do so if he chose; and that all that was intended by s. 3 was to get rid of the old machinery of a surrender, and to leave the rights of all parties otherwise in statu quo; and as the cus-

(1) 9 Hare, 698; 2 D. M. & G. 658.

1871

GARLAND v. MEAD.

tomary heir would have been entitled to admittance before the statute, if the devisee did not come in, so now the heir, if the lord think fit to admit him, may be admitted, as the devisees will not come in; and the effect of the admission of the heir under the old law, the surrenderee to the use of the will not coming in, was to prevent the lord from seizing quousque for want of a tenant. It necessarily follows in this case that, as the heir was presented for admittance, the effect is the same as before the statute, viz., to prevent the lord from seizing quousque. It is a very different question whether the lord is bound as a matter of duty to admit the heir, there being a regularly executed will brought to the notice of the lord, and it being clear that the persons who are entitled and ought to be admitted are the two trustees. I am very far indeed from saying that the heir can compel the lord to admit him as matter of right. No doubt the old authorities shew that where there are conflicting claims and titles the lord was bound to admit all parties presenting themselves; and the lord was in no worse —indeed, in a better—position, for he not only got a tenant, but two or more fines instead of one; and in such cases a mandamus has been granted to compel the lord to admit the different parties. It is a very different case where the heir is clearly not entitled, and some one else is, and ought, but will not come forward; and I am very far from saying it is incumbent on the lord as a matter of duty to admit the heir under such circumstances, and we have already refused to compel the lord by mandamus to admit the heir. After full discussion, I have come to the conclusion that Mr. Williams' construction of the statute is right; and inasmuch as the rights of the lord and heir are not affected by it, but all parties are left in statu quo, upon the offer of the heir to be admitted, the lord cannot seize quousque as for want of a tenant, and the defendants are entitled to judgment.

BLACKBURN, J. The question turns on the construction of s. 3 of the Wills Act. At common law, irrespective of the statute of Geo. 3, now repealed, it is very plain that the owner of a copyhold tenement had a valuable right which descended to his heir, but in most manors, where the custom existed, he could devise it away, provided he had surrendered to the use of his will; but the

devise conveyed no title or property till the devisee had been admitted. Till then the heir had a valuable right, and he might, according to the authorities, have brought ejectment before admittance; but a devisee or surrenderee could not devise until admittance. The Wills Act, repealed, 55 Geo. 3, c. 192, and s. 3, enacts: [The learned judge read the section.] I cannot but think that all that amounts to is, that the man who has a power of devise, provided he executed a surrender to the use of his will, should have the same power, notwithstanding he has not surrendered; and similarly as to all the cases enumerated; but there the enactment stopped; and there was no intention that the devise should have a greater effect without the surrender than it had before the statute with the surrender; the devise simply passed the right to be admitted. And whereas a surrender and devise formerly had that effect, now the copyholder may make a will and devise this right directly. It follows at once from this, that the defendants are entitled to judgment. For if this had been a devise under the old law, the devisee would not have had any title till admittance, and the estate would have descended to the heir, who might have come in and been admitted, and if he had done so, the lord, having got his tenant and his fine, could not have seized quousque; if the surrenderee or devisee had afterwards come in, then he became tenant, and the lord had a second fine; and it was only if neither came in that the lord could seize quousque. Here the heir has been tendered by his guardian for admittance, and the lord has the offer of all that he is entitled to; and he is not entitled to seize quousque for want of a tenant. I am glad to find that the view I entertain of the statute is that which is entertained by the branch of the profession most conversant with the matter; for although I do not agree with Mr. Williams that there was a decision on the point in any of the equity cases which he has cited, yet it does really appear from them that it was taken for granted by both judges and counsel that the statute had made no difference as to the passing of the estate; and they seemed to have assumed that the statute, though enlarging the power to make a devise of copyholds without a surrender and where no custom existed, did not in any way alter the effect of a devise when made. The cases, therefore, are of use as shewing the views of the profession,

1871

GARLAND v. MEAD.

although no opinion is expressed either in Scriven on Copyholds, or Jarman on Wills; but I do not agree that the cases shew the matter to be res judicata. I was not a party to the decision of this case when a mandamus was applied for, but I do not wish to throw the slightest doubt upon the decision; it is a very different thing to say that the lord is not entitled to seize quousque, when the heir is ready to come in, and to refuse the heir the assistance of a mandamus (which is in the discretion of the Court), where the lord refuses to admit the heir, on the ground that there are others who are entitled as devisees, and ought to come in, and whom he is ready and prefers to admit.

LUSH, J. If I felt myself at liberty to form an independent judgment, I cannot help thinking that the legislature, by s. 3 (and the closing paragraph of s. 5 corroborates this view), did intend to vest in the devisee the same interest as before the statute would have descended to the heir, and to extinguish all right of the heir, which after all is a purely technical right, to come in and be admitted. I yield to the cases cited by Mr. Williams, and particularly *Glass* v. *Richardson* (1); for though the precise point does not appear to have been presented to the notice of the Court, yet the question does appear to have been involved in the decision; for I do not see how the decision could have been arrived at except on the assumption that the estate passed to the heir since the statute, in the same way that it would have passed before, subject to the right of the devisee to come in and be admitted. As that case was afterwards affirmed by the Lords Justices, I do not feel myself at liberty to say that that construction of the statute is not right; I therefore, on this ground, concur with my Lord and my Brother Blackburn, that judgment must be for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *Winter, Williams, & Co.*

Attorneys for defendants: *Cookson, Wainewright, Pennington, & Wainewright.*

(1) 9 Hare, 698; 2 D. M. & G. 658.

COOK, APPELLANT; IPSWICH LOCAL BOARD OF HEALTH, RESPONDENTS. 1871 April 26.

Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *ss.* 69, 120—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *ss.* 64, 65—*Local Government Amendment Act*, 1861 (24 & 25 *Vict. c.* 61), *s.* 16—*Apportionment of Expenses—Disputing Apportionment—Arbitration on Dispute—Jurisdiction of Justices—Deposit of Plans.*

A local board of health gave notice, under s. 69 of 11 & 12 Vict. c. 63, to the owners of premises fronting two streets to level, pave, &c., and the owners having made default the board did the work themselves. An apportionment was made by the surveyor of the board, and a notice was served on the appellant, an owner of premises in one of the streets, that his proportion was 20*l.* 2*s.* The appellant did not pay, and a complaint against the appellant was heard before justices, when it was objected by the appellant that the apportionment was bad, on the ground that the expenses of the two streets had been lumped together, and the aggregate amount divided amongst the owners in the two streets; and the justices dismissed the complaint on that ground. The surveyor then made a fresh apportionment, and a notice was served on the appellant that his proportion was 19*l.* 11*s.* He gave notice that he disputed the apportionment, and a summons was taken out before two justices to settle the apportionment under s. 64 of 21 & 22 Vict. c. 98 (which enacts that all questions referable to arbitration under 11 & 12 Vict. c. 63, may, when the amount in dispute is less than 20*l.*, be determined by two justices in a summary manner). It was objected before the justices that the surveyor, having made one apportionment, could not make another apportionment; that plans had not been deposited at the office of the board, before giving the notice to do the work, as required by 24 & 25 Vict. c. 61, s. 16: but only at the office of the surveyor; that the works required by the notice differed from the works shewn on the plans, and that the works done by the board differed from both. These objections the justices overruled; they also refused to go into the question whether the money had been in point of fact expended; and after calculation they made an order that the proportion payable by the appellant was 19*l.* 11*s.*, and they went on to adjudge that the appellant do pay the same, and that in default of payment a distress warrant should issue. On a case under 20 & 21 Vict. c. 43:—

Held, 1. That the first apportionment was a nullity, and the surveyor, therefore, was not functus officio, and was right in making a fresh apportionment. 2. That the deposit of plans was not a condition precedent to the validity of all subsequent proceedings. 3. That whether the justices were acting as arbitrators as to the apportionment, or as justices to enforce the payment, they had no jurisdiction to inquire into the question whether the amount alleged had been actually expended; and that if the appellant was aggrieved by the alleged overcharge, or by the alleged variances, his remedy was by memorial to the secretary of state, under s. 120 of 11 & 12 Vict. c. 13, and 21 & 22 Vict. c. 98, s. 65.

Bayley v. *Wilkinson* (16 C. B. (N.S.) 161; 33 L. J. (M.C.) 161) followed as an authority on the third point.

Semble, that the justices, when acting as arbitrators under s. 64, had no jurisdiction to order payment, &c.

CASE stated by Justices of the borough of Ipswich under 20 & 21 Vict. c. 43.

1871

COOK v. IPSWICH LOCAL BOARD.

On the 27th of April, 1868, the Ipswich Local Board of Health served notices upon the owners of property in Purplett Street and in Kemp Street (two streets in the borough of Ipswich which were not highways), under s. 69 of the Public Health Act, 1848, 11 & 12 Vict. c. 63 (1). The appellant is the owner of property abutting on Purplett Street, and the notice served upon him stated that the street was not levelled, &c., to the satisfaction of the board, and required him to make good the same with drains, &c., of specified dimensions, &c., as shewn on the plan and sections of the works prepared by the surveyor of the Local Board, &c., the whole of the works to be executed in accordance with the plans and sections thereinbefore referred to, and then lying for inspection at the office of the surveyor of the local board at the town-hall of the borough, and of the dimensions, widths, and levels shewn thereon.

The board at the same time served similar notices upon other owners of premises in Purplett Street and Kemp Street. The two streets adjoin at right angles.

The appellant and all the other owners having failed to comply with the notice, the board proceeded to execute the work themselves under the superintendence of their surveyor on both the streets at the same time. The work was not done under contract, but the surveyor purchased, on behalf of the board, some of the various materials necessary, and took others from the stock then

(1) 11 & 12 Vict. c. 63, s. 69: "In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may be required to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same, within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises; and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case), in the manner provided by this Act [see s. 123]; and such expenses may be recovered from the last-mentioned owners in a summary manner [see s. 129], or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided."

in possession of the board, and employed on the works the ordinary staff of labourers, horses and carts then in the service of the board, and engaged others to assist them.

On the 2nd of September, 1868, the surveyor of the board served a notice on the appellant, stating that the proportion payable by the appellant of expenses incurred by the board in making good Purplett Street, had been settled and apportioned by the surveyor to be the sum of 20*l.* 2*s.* 1¼*d.*, and requiring payment.

On the 4th of November, 1868, the appellant gave notice to the board that "I intend to dispute and resist payment of the sum of 20*l.* 2*s.* 1¼*d.* charged to me for work done in Purplett Street."

On the 22nd of December, 1868, the board laid an information charging that the appellant, being the owner of certain premises abutting on Purplett Street, was by due notice required to make good the same; that the notice was not complied with, whereupon the board executed the works and incurred expenses, the amount of which to be paid by the appellant was duly apportioned at the sum of 20*l.* 2*s.* 1¼*d.*, and that the appellant had not paid the amount; whereupon a summons was issued.

On the 24th of December, 1868, the summons and complaint were heard before the borough justices, when it was contended, on behalf of the appellant:—

1. That the notice served by the appellant on the board on the 4th of November, 1868, required the matter in dispute to be referred to arbitration as provided by s. 69 of 11 & 12 Vict. c. 63, and that the justices had no jurisdiction.

2. That the apportionment of expenses upon which the information was founded was bad and invalid, because the gross cost of the two streets was apportioned pro ratâ among all the owners of premises in those streets, instead of apportioning the expenses exclusively incurred in Purplett Street among the owners of premises in that street, and the expenses exclusively incurred in Kemp Street among the owners of premises in that street.

It appeared by the evidence of the board's surveyor, that the width of Purplett Street was thirty-five feet, and the width of Kemp Street thirty feet; that the total expenses incurred by the board in executing the works in both streets was 375*l.* 11*s.* 1*d.*,

1871

COOK v. IPSWICH LOCAL BOARD.

that the surveyor had not separated the costs of the streets from each other, and that he had therefore charged for twenty feet frontage in Purplett Street, the same as for twenty feet in Kemp Street.

The appellant also objected,

3. That the plans and sections of the works had not been deposited in the office of the local board within the meaning of s. 16 of 24 & 25 Vict. c. 61 (1).

The evidence as to this objection was that in April, 1857, when the Public Health Act was applied to the borough the local board had their offices at No. 2, Princes Street, where the surveyor and the accountant to the board transacted the duties of their respective offices in distinct rooms. On the outer door-post were and are the printed inscriptions, "Office of the Local Board of Health," and "The surveyor of the local board attends here every morning from nine till half-past nine." The district rate-books required by s. 98 of 11 & 12 Vict. c. 63, to be kept at the office of the local board open to public inspection, and the books of account and documents relating to the office of accountant were and still are kept at No. 2, Princes Street. The public notices required by s. 99 of the same Act have always stated that the rate is deposited for inspection "at the office of the local board of health, Princes Street," and the bye-laws which s. 116 requires to be "hung up at the office of the said board," were and are hung up at the said office. The plans and sections of works intended to be executed under s. 69 of the same Act were kept in the surveyor's room at the said office until January, 1868, at which date the surveyor

(1) 24 & 25 Vict. c. 61, s. 16: "Before giving the notice mentioned in the 69th section of the Public Health Act, 1848, the local board shall cause plans and sections of the works intended to be executed under that section, and the 38th section of the Local Government Act, 1858, to be made under the direction of their surveyor, on a scale of not less than one inch for eighty-eight feet for a horizontal plan, and on a scale of not less than one inch for ten feet for a vertical section; and in the case of a sewer, shewing the depth of such sewer below the surface of the ground; and such plans and sections shall be deposited in the office of the local board, and shall be open at all reasonable hours for the inspection of all persons interested therein during the period for which such notice is required to be given, and a reference to such plans and sections in such notice shall be held sufficient without requiring any copy of such plans and sections to be annexed to such notice."

removed to a room situate in the new town-hall, taking with him the plans and papers appertaining to his office, and thenceforth performed his duties there. The plans and sections in relation to this case were deposited at the surveyor's office at the town-hall, and not at the office at 2, Princes Street; which latter office the appellant contended was and is the office of the local board within the meaning of the said Act. The appellant did, in fact, call at the surveyor's office at the town-hall, and inspected the plans and sections there.

The appellant also objected,

4. That the plans of the works intended to be executed, prepared by the board's surveyor under s. 16 of 24 & 25 Vict. c. 61, differed materially from the notice served on the appellant, requiring him to execute the works under s. 69 of 11 & 12 Vict. c. 63.

As to this objection, the following variances appeared on comparing the plans with the notice to the appellant, viz., carriageway by plan, twenty-two feet; by notice, twenty-three feet. Footway by plan, five feet; by notice, six feet.

The appellant also objected,

5. That the works actually done by the board differ materially from the plans and the notice.

The evidence before the justices upon this objection was as follows:—Drain laid down seventy feet shorter than shewn on plan. Carriageway by plan, twenty-two feet; by notice, twenty-three feet; work done, twenty-one feet. Footway by plan, five feet; by notice, six feet; work done, 5 ft. 6 in.

The appellant also objected,

6. That the board were bound to contract for the execution of the works, and had no power to do them themselves.

The justices dismissed the summons on the ground that the apportionment was bad; and subsequently gave the appellant a certificate under s. 14 of 11 & 12 Vict. c. 43, which recited the complaint, and certified that the justices had dismissed it.

On the 23rd of February, 1869, the surveyor to the board served the appellant with a notice that he had apportioned the appellant's proportion of the expenses incurred by the board of health in Purplett Street at 19*l.* 11s. 10*d.*, and required payment of that sum.

1871

COOK v. IPSWICH LOCAL BOARD.

On the 10th of November, 1869, the appellant was summoned to answer the information and complaint of the clerk to the board,

That on or about the 18th of March, 1868, Purplett Street, situate within the borough, which said street was not then a highway, was not levelled, &c., and made good to the satisfaction of the board, and therefore in or about the 27th of April, 1868, the board, by notice in writing to the appellant, then being the owner of certain premises fronting upon certain parts of the said street, required him to level, &c., the same within the space of one calendar month from the service of the notice, being a reasonable time in that behalf. That the notice was not complied with by the appellant, and thereupon the board, pursuant to s. 69 of the Public Health Act, 1848, proceeded to execute, and did execute, the works mentioned and referred to in the notice, and did thereby incur certain expenses, and the proportion of such expenses to be paid by the appellant according to the frontage of his premises, as settled by the surveyor of the board, amounted to a sum of less than 20*l.*, to wit, the sum of 19*l.* 11*s.* 10½*d.* That on the 22nd of February, 1869, due notice was given to the appellant of the sum so due from him, and payment thereof was duly demanded by the board, and that the appellant hath not paid the same; and further, that the appellant, on the 10th of May, 1869, by a notice in writing to the board, disputed such proportion, and the amount thereof so settled by the surveyor of the local board of health (1); whereupon, on the part of the board, it is prayed that the appellant may be summoned before two justices, and the amount in dispute may be determined before the said justices in a summary manner. And that the said justices may also determine the amount of costs incurred in this behalf, and by whom such costs, or any part of them, shall be paid.

At the hearing of this summons, on the 15th of November, 1869, the appellant raised the same six objections as on the previous summons.

The appellant also objected,

7. That the justices had already, on the 24th of December, 1868, heard and determined an information and complaint for the same matters between the same parties.

8. That the information had not been, as it ought to have been, laid within nine months of the service on the appellant of the notice of the surveyor's apportionment of expenses, as provided by 11 & 12 Vict. c. 43, s. 11, and 21 & 22 Vict. c. 98, s. 63.

9. That the justices were wrong in declining to inquire whether the amount of 250*l.* 9*s.* 8*d.*, which the surveyor stated had been expended in Purplett Street had actually been so expended, and in not allowing the appellant to examine the surveyor as to the items forming the said sum.

(1) This notice appears to have been inadvertently omitted in the statement of the case.

As to this objection, the surveyor stated in evidence that the total cost of the work done in Purplett Street was the sum of 250*l.* 9*s.* 8*d.* It was proposed, on behalf of the appellant, to cross-examine him, with a view to shew that that sum had not in fact been spent upon that street; but the justices were of opinion that they had no power to inquire into the amount expended by the board, but must take the sum as stated by the surveyor, and the justices, therefore, refused to allow any cross-examination or to receive any further evidence on this point.

The justices overruled all the appellant's objections, and having ascertained by calculation that the surveyor's apportionment of the sum of 250*l.* 9*s.* 8*d.* among the owners of premises in Purplett Street was accurately made, and that the appellant's proportion, according to his frontage, was 19*l.* 11*s.* 10*d.*, they made an order which recited the above complaint at length, and that a summons had been issued accordingly and proceeded:—"Now, having heard the matter of the said complaint, and the evidence adduced before us in support thereof, and having also heard all the evidence tendered by and on behalf of the said A. J. Cook, we do hereby determine that the amount in dispute and to be paid by the said A. J. Cook to the said board for and in respect of his proportion of the expense incurred in executing the said works before mentioned shall be the sum of 19*l.* 11*s.* 10½*d.* And we do hereby order and adjudge the said A. J. Cook to pay to the said board the said sum, and also the further sum of 13*s.* for costs in this behalf. And if the said several sums be not paid forthwith, we order that the same be levied by distress and sale of the goods and chattels of the said A. J. Cook, unless the said sums be sooner paid."

If the Court should be of opinion that the appellant's objections or any of them are good and valid objections, then the order of the justices was to be quashed. But if the Court should be of a contrary opinion, then the order was to be confirmed.

Bulwer, Q.C. (*Graham* with him), for the appellants. This is a proceeding under s. 69 of 11 & 12 Vict. c. 63. The appellant, having received notice on the 2nd of September, 1868, that the sum apportioned on him in respect of the works done in Purflett

1871

COOK v. IPSWICH LOCAL BOARD.

Street was 20*l.* 2*s.*, on the 4th of November, gave notice that he disputed the apportionment. The local board ought therefore to have proceeded by arbitration, instead of which, they proceeded before justices to enforce the payment.

[LUSH, J. The notice of the appellant is not that he disputes the apportionment, but that he will dispute and resist payment. The rest of the Court expressed their concurrence in this view.]

If the Court is of that opinion, then the board was right in proceeding, on the 22nd of December, before justices, as the three months given by s. 63 of 21 & 22 Vict. c. 98, had expired. The justices decided that the objection that the expenses of two streets had been lumped together was proved and was fatal, and dismissed the complaint, and gave the appellant a certificate of such dismissal. There the matter ended, and the surveyor had no power to make a fresh apportionment.

[The Court intimated that they were of opinion that the facts shewed that the first was no apportionment, and that the surveyor was therefore not functus officio.]

The question then turns on the proceedings upon the notice of the fresh apportionment of the 23rd of February, 1869. After the receipt of this notice, the appellant gave notice on the 10th of May of his intention to dispute the apportionment; this notice is omitted from the case, but it is recited in the information which the board laid, and upon which the summons was granted and the magistrates proceeded. This, as appears from the summons, was a proceeding by arbitration under s. 69 of the original Act, and s. 64 of the second Act (1), which puts two justices in the place of an arbitrator when the sum is under 20*l.*; and all the justices had to do was to decide whether the sum charged and the apportionment made on the appellant were right; and they had no

(1) 21 & 22 Vict. c. 98, s. 64: "All questions referable to arbitration under the Public Health Act, or any Act incorporated therewith, may, when the amount in dispute is less than £20, be determined before two justices in a summary manner, but the justices may, if they think fit, require, that the work in respect of which the claim of the Local Board is made, and the particulars of the claim, be reported on to them by any competent surveyor, not being the surveyor of the Local Board; and the justices may determine the amount of costs incurred on that behalf, and by whom such costs or any part of them shall be paid."

jurisdiction to make an order for payment; but a second proceeding would have been necessary, just as if the case had been before an ordinary arbitrator. The order, therefore, is bad.

[*Bosanquet*, contrà, pointed out that this point was not raised in the case.

BLACKBURN, J. If there is no other tenable objection to the order, the latter part of the order may be rejected as surplusage; at all events the objection is not now open.]

The order then must be taken as it stands; and inasmuch as the justices have assumed to act not only as arbitrators, but as summarily enforcing the payment, the question arises whether they ought not in either capacity to have allowed the appellant to shew by cross-examination of the surveyor, and otherwise, that the sum charged upon Purplett Street had not been really expended upon it. *Bayley* v. *Wilkinson* (1) is an authority, no doubt, that before an arbitrator the question whether the sum charged has been reasonably expended cannot be inquired into; but here it was sought to shew that the expenses had not in *fact* been incurred in this street, and therefore were not "expenses incurred."

[LUSH, J. The language of s. 64 of the second Act seems to contemplate an inquiry into the propriety of the outlay, for it gives power to the justices, if they think fit, to require that the work and the particulars of claim be reported on to them by an independent surveyor.

BLACKBURN, J. Erle, C.J., in *Bayley* v. *Wilkinson* (2) notices that section, and says, "At the first reading, that appeared to me to authorize an inquiry as to whether the expenses had been properly incurred by the local board; but, upon farther looking at it, I am of opinion that it only applies to the arbitration given by the former statute, and is to be confined within the same limits. And though it may be said to be unreasonable that a board should have power to incur expense, and that those upon whom the burthen of paying it is to fall should have no means of investigating the propriety of the outlay, yet the same inconvenience occurs in many instances of self-government of districts, where individuals are selected to perform public duties involving the expenditure of

(1) 16 C. B. (N.S.) 161; 33 L. J. (M.C.) 161.

(2) 16 C. B. (N.S.) at p. 189; 33 L. J. (M.C.) at p. 166.

1871

COOK v. IPSWICH LOCAL BOARD.

large sums of money which are to be provided for by a rate levied upon the district. The remedy is by removing them if their trust is neglected or abused. They have not, therefore, an absolute irresponsible power. Besides, the expenditure of such bodies is always controlled by auditors. Upon the whole, the best opinion I can form is, that the outlay actually made is to be settled finally by the local board, and to be apportioned amongst the several owners or occupiers by the surveyor, or, in case of dispute, by an arbitrator, whose jurisdiction is confined to the question of apportionment, and who has no authority to inquire into the reasonableness of the amount which has been expended upon the works."]

No doubt it must be conceded, although Willes, J., expressed his doubts, that that case is conclusive that as arbitrators the justices cannot go into the reasonableness of the expenditure; but surely they may go into the question whether in point of fact the expenditure has been incurred, the case in the Common Pleas is no authority against that: nor is that case any authority that as justices enforcing payment they may not go into both those inquiries. If they may not go into these inquiries, the inhabitants are at the mercy of the local authority without any appeal.

[LUSH, J. They may memorialize the secretary of state under s. 120 of the first Act, and s. 65 of the second Act; as was done in *Wallington* v. *Willes* (1).]

The next objection is, that the plans and sections have not been deposited in the office of the local board, as required by s. 16 of 24 & 25 Vict. c. 61, s. 16.

[COCKBURN, C.J. If the justices had no authority except as to the apportionment, how can they go into those questions?]

The deposit of the plans is a condition precedent to the power of the board to do the works, and is therefore the foundation of the justices' jurisdiction, whether as arbitrators or otherwise.

[BLACKBURN, J. Section 16 appears to be only directory; there is nothing to make the deposit of the plans a condition precedent, so as to make void the notices, and prevent the expenses from being recoverable.]

(1) 16 C. B. (N.S.) 797; 33 L. J. (M.C.) 233.

1871

COOK v. IPSWICH LOCAL BOARD.

In *Reg.* v. *Surrey* (1), it was held, under 5 & 6 Wm. 4, c. 50, s. 85, that the affixing of notices at all the required points was a condition precedent to all proceedings.

[BLACKBURN, J. The words in that statute are much more stringent; not only are fixed notices required, but they must be proved to have been fixed before the justices can give their certificate.

MELLOR, J. The only objection after all is, that the plans were deposited at the office of the manager instead of the office of the local board; and the appellant was in no way aggrieved as he saw the plans at the surveyor's office.]

The next objection is a substantial objection, that the notice required the appellant to pave the street in a particular way; the plans differed from the notice; and the work done differed from both.

[COCKBURN, C.J. All this might be very good ground of application to the secretary of state.]

The next objection is that the board ought not to have done the work themselves, instead of having employed a contractor under s. 85, which expressly empowers them to make such contracts.

[BLACKBURN, J. They "may," not "must," contract.]

The only remaining objection is, that the information on the 10th of November, 1869, was too late; but if the Court is of opinion that the first apportionment was a nullity, and the surveyor was not functus officio, taking the proceedings to commence with the notice of the fresh apportionment on the 23rd of February, the information was in time.

Bosanquet (*Notcutt* with him), for the respondents, was not heard.

COCKBURN, C.J. I think it is not necessary to call upon the respondents. We are of opinion that the decision of the magistrates was right, and that we cannot, upon the state of facts, set their order aside.

It is clear that the order made by the local board of the borough of Ipswich, with reference to the paving of the street, was one within their competency. It is equally clear that it was, in the

(1) Law Rep. 5 Q. B. 466.

1871

COOK v. IPSWICH LOCAL BOARD.

first instance, incumbent upon the appellant, as an owner of property in that street, to comply with the order by executing the works which the local board required to be done. It is equally clear that, upon his not complying with the order, by failing to execute the work, it was competent under the statute to the local board to cause the work to be done. It is equally clear, the work having been done, upon the expense incurred being apportioned amongst the owners of property in the street, that it was incumbent upon the appellant to pay his proportion, or to take the necessary steps allowed by the statute for the purpose of raising the question as to whether the amount apportioned to him was a just proportion of the entire expense. It seems that the appellant having failed to execute the work, and the local board having caused it to be executed, the surveyor made an apportionment; but unfortunately, in the first instance, he included in the apportionment the expense of the works which had been done in an adjoining street. That was not right according to the terms of the statute. Upon objection being taken, and it being clear that that apportionment was one which could not be enforced, and was therefore practically a nullity, the surveyor made a fresh apportionment, which is no longer open to the objection of the expenses in the neighbouring street having been combined with those in the street in which the appellant is an owner, and that difficulty is entirely cleared away. The first apportionment was a nullity, and could not be enforced; and that being so, it was not only in the surveyor's power, but it was his duty to make a new apportionment.

We have then to consider what took place upon that apportionment. The statute 11 & 12 Vict. c. 63, s. 69, provides, where a local board themselves execute works of this kind, and the surveyor makes an apportionment among the parties liable to pay, that if one of the parties dispute the propriety of the assessment which has been made upon him, the matter shall be referred to an arbitrator. By the subsequent Act, 21 & 22 Vict. c. 98, s. 64, in case the sum sought to be recovered is less than 20*l.*, and there is a dispute about it, the matter shall be determined in a summary manner by two justices. Upon the new apportionment the amount claimed from the appellant was under 20*l.*, therefore the case fell within the provision of the second statute. That being so, the

matter comes before the justices, and it is not proposed on the part of the appellant to go into the question whether, the expense being taken at a given sum, the amount assessed upon him was a just proportion of the general expenses; but he proposed to go into the question, whether the amount charged by the local board as having been expended generally, was, in point of fact, expended. The question put to us, in the first instance, is to decide whether it was competent to the magistrates, or incumbent on them, to go into that question. In my opinion to have gone into that question would have been to have gone beyond the limits of their jurisdiction. By the second Act, 21 & 22 Vict. c. 98, the two justices are placed in the position of arbitrators. It is quite clear that qua arbitrators they could not have gone into any such question, their jurisdiction is limited to inquiring whether, the expenses amounting to a given sum, the amount charged to a particular owner is his fair and just proportion. I think, therefore, that the justices could not have gone into that question as arbitrators.

Mr. Bulwer puts it upon a different ground. He says that the justices exercised, or took upon themselves to exercise—whether rightly or wrongly is another matter—the double function of arbitrators, under s. 64 of the second Act, and of magistrates exercising summary jurisdiction, under ss. 69 and 129 of the original Act, to enforce the amount found to be due by the decision of the arbitrators. The question is not raised before us as to whether it was competent to them to act in that double capacity, and at once to proceed to make an order for payment without allowing any interval, after having, in the exercise of their functions as arbitrators, decided the amount the appellant was called upon to pay; that question was not raised before us, and we cannot go into it now. But, assuming that the necessary interval had been allowed, or taking the case where an arbitrator has fixed the amount, and then the magistrates are called upon in the exercise of their summary jurisdiction to make an order to enforce payment of the amount, the question presents itself whether, in the exercise of their summary jurisdiction, they could go into any question except that of whether the proportion assessed upon the particular individual is the right proportion or not. I think they cannot; but that as to this they are simply exercising what may be called a ministerial

1871

COOK v. IPSWICH LOCAL BOARD.

office, though of course they must see that the person against whom the order is made is the right person, and that there has been some assessment, and that the proportion that he is to pay has been fixed by the proper authority. I think, although in that respect their functions may be said to be judicial, that in all other respects they are simply ministerial, and that as soon as the amount which the man has to pay is ascertained, they are bound to make an order without looking into the facts of the case. The case seems to me to be quite analogous to those of rates and matters of that kind, in which we have held again and again that it is not for the magistrate to inquire into the validity of the rate or order on which he is asked to exercise his summary jurisdiction. I think, therefore, if this had been an application to the magistrates, after the decision of an arbitrator as to the amount, it would not have been competent to the justices to go into these matters to which Mr. Bulwer now refers. No doubt it is open at first sight to this strong observation. It certainly would be a very monstrous thing that a man should be called upon to pay his proportion of a sum alleged to have been expended upon matters of this kind, if, in point of fact, that sum had not been expended; that a man should be called upon to provide his proportion of £1000, when only the half of that sum might have been expended. But we find that the legislature has not left the party in the hopeless condition that Mr. Bulwer contended must result if the magistrates were not competent to go into this inquiry; because by s. 120 of the original Act provision is made for an appeal by the parties aggrieved to the General Board of Health, who would of course correct any irregularity or injustice that might have occurred. The power vested in the General Board of Health by that Act has since been transferred to the secretary of state by s. 65 of the second Act; and if a person complained that he had been made to pay his proportion of a sum which had not been expended, and that there had been gross impropriety of conduct, no doubt the secretary of state would exercise the power with which the legislature has invested him, and inquire into such a matter. Therefore, that is the course which a person must adopt if he feels that he has been aggrieved by a proceeding of this kind; it would be of the greatest possible inconvenience if, on every occasion when the

justices are called upon to enforce an order of this sort, it should be a question how far the statute has been complied with by the board of health, how the money has been expended, or, at all events, the propriety of executing the works. That, I think, is the true construction of this statute.

As to the other points taken by Mr. Bulwer, I think they were disposed of in the course of the argument. It may be the preliminaries required by the statute have not been strictly complied with, but I do not see that the appellant has sustained any grievance therefrom; and I agree with what was thrown out by my Brother Blackburn that these matters are not conditions precedent, and their non-observance would not vitiate the orders. I think the magistrates were right in refusing to go into this matter.

It may be a very serious question, though it is not raised before us now, whether the magistrates in at once making a summary order for payment have not exceeded their powers, and whether it would not be a wise thing that, as the magistrates have determined, in the exercise of their province and duty as arbitrators, what the amount is which the appellant is called upon to pay, application should be made to other magistrates to make a second order enforcing payment. I merely throw it out as a matter for the consideration of the respondents, with a view of preventing further litigation upon the subject.

BLACKBURN, J. I am of the same opinion entirely. I quite concur in what my Lord has last said, that before attempting to levy the distress under the present order which the magistrates have made, those who advise the local board had better consider whether it is safe so to do; and whether the danger could not be avoided by applying to other justices to enforce, by distress, the order fixing the proportion which was made by the justices when sitting in lieu of arbitrators. However, that is not before us; it is simply a question that the respondents had better consider before they act, in order to be safe.

As to all the other objections, I entirely agree with my Lord, and I will say nothing on any of the objections except the only one which seemed to me of any substance at all, and that was the

1871

COOK
v.
IPSWICH
LOCAL BOARD.

last; the 9th objection, in which the appellant states that he offered to cross-examine the surveyor, for the purpose of shewing, as I gather, that this sum of 250*l.* 9*s.* 8*d.*, which was the sum the local board of health put down as the expense of paving the street, had not been expended, as alleged, in this street, but that a portion of it had been expended on another street. Very probably, if the facts had all come out, it would appear, as it often occurs, that sewers or drainage work commenced in a street cannot be finished within the street it is intended for, but must be carried on further, and a dispute might probably arise in that way. The appellant wanted to investigate the matter before the justices. It is obvious that where there is a large sum expended in this way, and sought to be enforced in what I may call driblets before magistrates summarily, it would be in the highest degree inconvenient, if the local board were forced each time to prove to the satisfaction of the magistrates before whom the matter went, that these expenses were properly incurred in respect to what was done. And it would be also extremely inconvenient if that question had to be decided summarily by the justices without any appeal, which would be the case as far as I can ascertain. Any justice might be presuming to decide against the local board on a matter where the local board would have no appeal from him, and this small matter of 19*l.* might involve the question of whether they could recover the whole 250*l.* In many other cases the question might be raised on a few shillings, where an obstinate litigant refused to pay. That would be most inconvenient; nevertheless, if the legislature had given such a jurisdiction to the magistrates, it could not be helped; but it is very strong ground for thinking that the legislature did not intend to give this jurisdiction to the magistrates. The 69th section, after saying that the board are to give notice to the owners of what they require to be done, and that if the owners do not do it, the board may do it themselves, then says: "And the expenses incurred by them in so doing shall be paid by the owners in default according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, and in case of dispute, as shall be settled by arbitration." So that here it is laid down that the expenses incurred by the local board of health doing the works shall be paid by the owners in the propor-

tion to be settled in the manner which is described. Then the section goes on to say: "And such expenses may be recovered from the last-mentioned owners in a summary manner." In the case in the Common Pleas of *Bayley* v. *Wilkinson* (1), the contention was, that when the parties came before the arbitrator to apportion the expenses he was not merely to consider in what proportion the sum was to be divided amongst the different owners, but it was urged strongly that the arbitrator must also inquire as to how the money had been expended; that he is not merely to say how they are to divide the sum expended amongst the owners, but that it is involved in the inquiry, and the arbitrator must look to see, if the expense has been incurred. But the Court of Common Pleas decided very distinctly that, in their opinion, the legislature did not intend such an inquiry at all; that, as was explained by Erle, C.J., the legislature, knowing that the local board of health were a public body, thought that they might trust them primâ facie, and the arbitrator was simply to see to the apportionment. Willes, J., came to the same conclusion ultimately, though not without considerable doubt, and he cites a good many sections of the Act pointing out that "expenses incurred" in s. 69 means incurred in fact, whether reasonable or not. But Mr. Bulwer argued that, though as against the party assessed when before the arbitrator the local board is supposed to be right, nevertheless that may not apply when the magistrates are asked to enforce payment in a summary manner. He says, though the arbitrator might possibly not review what the local board had done in appropriating the expenses, nevertheless the justices may in a summary manner decide it. I must say when once it is granted that the decision of the Common Pleas is a right decision in saying the arbitrator cannot go into the inquiry, à multo fortiori, the two justices enforcing in a summary manner the sum apportioned cannot do it. Mr. Bulwer also in argument endeavoured to make out this distinction. In the case of *Bayley* v. *Wilkinson* (1), it seems the local board of health had done the work in a wasteful manner, and expended much more than was necessary. The contention here is that these are not "expenses incurred," inasmuch as the local board of health have improperly charged against this

(1) 16 C. B. (N.S.) 161; 33 L. J. (M.C.) 161.

1871

COOK
v.
IPSWICH
LOCAL BOARD.

street some expenses really incurred somewhere else. I cannot appreciate the distinction between the two cases; if the one would be a matter for the arbitrator or magistrates to inquire into, the other would be also; but I cannot see the distinction which would make the one a matter for inquiry and the other not. Unless, therefore, the Common Pleas are wrong, that distinction on which Mr. Bulwer mainly rested his argument cannot be maintained.

Then comes what would be the strength of the argument for the appellant, if there were not the decision of the Common Pleas, which is binding upon us, viz., that it is a possible thing that the local board of health may either charge an utterly wasteful and erroneous sum, or they may have in mistake charged sums they ought not to charge in estimating expenses which they say they have incurred; and in that case it would be very hard if there is not some remedy provided for the man who may be charged too much, and who is obliged to pay down his proportion of a sum which ought not to have been charged. No doubt, there ought to be an appeal in some way or other: but then we find in s. 120 of the original Act, which seems to me expressly to provide for the case, that where the local board have done anything wrong in cases where they are empowered to recover any expenses incurred in a summary manner, any person who shall deem himself to be aggrieved by the decision of the local board, may, within seven days after the notice, address a memorial to the general board, for which is now substituted, by s. 65 of the new Act, the secretary of state, and get such relief as shall be necessary. If the facts were that the local board had charged 1000*l.*, when in truth and in fact they ought only to have charged 800*l.*, I cannot doubt that the person memorialising the Home Secretary, and stating the facts, would obtain the relief he might require, and that the Home Secretary would direct the board not to charge 1000*l.* but only 800*l.* That, I think, is a sufficient remedy; without having recourse to the very inconvenient remedy that every person who chooses to dispute the matter may require this very difficult inquiry to be gone into before the magistrates who are asked to enforce the payments summarily. In truth it seems to me that the magistrates in enforcing this demand for an apportionment of the expenses are very much in the position of a magistrate when

called upon to issue a distress warrant to enforce a rate. A rate is good unless it is appealed against to the quarter sessions, and the magistrate cannot inquire into it. The expenses are to be enforced by the magistrates summarily, unless there has been an appeal against them to the Home Secretary. The magistrates cannot enter into the facts.

1871

COOK v. IPSWICH LOCAL BOARD.

MELLOR and LUSH, JJ., concurred.

Judgment for the respondents.

Attorney for appellant: *Crowdy, for Aldous & Pearce, Ipswich.*
Attorney for respondents: *Bromley, for Notcutt & Son, Ipswich.*

COATES AND ANOTHER *v.* COLLINS.

May 10.

Covenant for Title—Assignment of Lease for Lives—Covenant that Lease is subsisting for the Three Lives.

By deed of July, 1853, after reciting a lease of 10th of March, 1847, from E. F. to defendant, for the lives of A., B., and C., and the survivor of them, defendant conveyed the premises to plaintiff to hold for the lives of A., B., and C., and the survivor of them, and covenanted "that the said lease of the 10th of March, 1847, is a good, valid, and subsisting lease in the law, for the lives of the said A., B., and C., and the survivor of them, and is not forfeited, surrendered, or become void or avoidable." B. having died before July, 1853, plaintiff sued defendant for a breach of the covenant.

Held, by Blackburn and Mellor, JJ. (Lush, J., dissenting), that the mention of the three lives was mere matter of description, and that the covenant only amounted to a covenant that the lease was still subsisting and not that the three lives were still in existence.

DECLARATION: That by a deed of the 2nd of July, 1853, between the defendant of the one part and M. G. W. Coates of the other part,—after reciting an indenture of lease of the 10th of March, 1847, between Lady Emily Foley, of the first part, and H. Lenthal and G. C. Carden, of the other part, by which Lady E. Foley demised to Lenthal and Carden, their heirs and assigns, certain premises to hold to them their heirs and assigns, for the lives of W. Walker, W. Jones, and R. Heath, and the lives and life of the survivors and survivor of them; and also reciting

1871

COATES v. COLLINS.

an indenture of the 1st of January, 1853, by which Lenthal (Carden being dead) granted and conveyed to the defendant, his heirs and assigns, the said premises, to hold to the defendant, his heirs and assigns, for and during the said three lives or the survivor,—the defendant granted and conveyed to Coates, his heirs and assigns, the said premises to hold to him his heirs and assigns for and during the said three lives and the life of the survivor; and the defendant covenanted with Coates, his heirs and assigns, that the said recited indenture of the 10th of March, 1847, then was a good, valid, and subsisting lease in law, for the lives of the said W. Walker, W. Jones, R. Heath, and the survivors and survivor of them, and that the same was not forfeited, surrendered, or become void or voidable; and that the defendant had in himself good right to convey the premises to Coates, his heirs and assigns. That afterwards all the estate of Coates became vested in the plaintiffs. Breach, that at the time of the execution of the deed of the 2nd of July, 1853, the recited indenture of the 10th of March, 1847, was not a good, valid, and subsisting lease in law for the lives of the said W. Walker, W. Jones, and R. Heath, and the survivors and survivor of them, but the said W. Jones had died long before.

Plea: setting out the deed of the 2nd of July, 1853, at length; by which (after reciting the lease of the 10th of March, 1847, and the assignment by Lenthal to the defendant Thomas Collins), the defendant doth grant and convey unto M. G. W. Coates, his heirs and assigns, all that messuage, &c., to have and to hold the said messuage and premises unto the said M. G. W. Coates, his heirs and assigns, for and during the lives and life of the said W. Walker, W. Jones, and R. Heath, and the lives and life of the survivors and survivor of them, and for and during all other the estates and interest of the said T. Collins therein, under, and subject nevertheless to, the rents, heriots, covenants, provisoes, and agreements, in the said recited indenture of lease of the 10th of March, 1847, reserved and contained. And the said T. Collins doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said M. G. W. Coates, his heirs and assigns, in manner following (that is to say) that the said recited indenture of lease of the 10th of March, 1847, is a good, valid, and subsisting lease in the law for the lives of the said W. Walker,

1871

COATES v. COLLINS.

W. Jones, and R. Heath, and the survivors and survivor of them, and is not forfeited, surrendered, or become void or avoidable, and that the said yearly rent thereby reserved, and the covenants, provisoes, and agreements therein contained, by and on the part of the tenant or lessee, to be paid, observed, and performed, have been and are duly paid, observed, and performed, up to the date and execution of these presents. And also that the said T. Collins now hath in himself good right and absolute authority by these presents to grant, convey, and assure the said messuage and premises hereby granted and conveyed, unto and to the use of the said M. G. W. Coates, his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents. And also that it shall and may be lawful to and for the said M. G. W. Coates, his heirs and assigns, henceforth peaceably and quietly to enter into and upon, hold and enjoy, the said messuage and premises hereby granted and conveyed, and to receive and take the rents and profits thereof during the lives of the said W. Walker, W. Jones, and R. Heath, and the survivors and survivor of them without any let, interruption, hindrance, &c., whatsoever, of, from, or by the said T. Collins, his heirs or assigns, or any other person or persons lawfully or equitably claiming or to claim the same or any part thereof by, from, through, under, or in trust for him or them. There was also a covenant for further assurance by the defendant, of the said premises unto Coates, his heirs and assigns, "for the lives of the said W. Walker, W. Jones, and R. Heath, and the lives and life of the survivors and survivor." The plea concluded that, although W. Jones did die before the making of the deed of the 2nd of July, 1853, yet W. Walker and R. Heath were living at the time of the making of the deed; and unless the covenants were broken by such death of W. Jones, the covenants were not broken by defendant.

Demurrer and joinder.

J. Brown, Q.C., for the plaintiffs. The covenant on which this action is brought amounts to a covenant that the three lives are still subsisting. The names of the three lives are not introduced as mere matter of description, the description ends with the date; and the collocation of the words shews this; it is not a covenant

1871

COATES v. COLLINS.

that the lease for the three lives is a good and subsisting lease, but that the lease of the 10th of March, 1847, is a good and subsisting lease for the three lives. There is no authority directly in point, but *Barton* v. *Fitzgerald* (1) may be referred to.

Manisty, Q.C. (*Lord* with him) for the defendant. The covenant is no more than the common covenant that the lease has not been forfeited. The introduction of the names of the cestui que lives is simply matter of description. Just as the original number of years would have been introduced, had the lease been for years, although many of the years had elapsed. All the covenants, for quiet enjoyment, for further assurance, are in precisely the same words,—shewing that they are mere words of description.

J. Brown, Q.C., in reply. The fact, that the covenants for further assurance and for quiet enjoyment are in the same terms, makes for the plaintiffs, when attention is also called to the habendum, which is to hold for the lives of Walker, Jones, and Heath. The assignment therefore, taken as a whole, shews that the intention of the parties was to convey a lease for the three lives as all then existing.

BLACKBURN, J. The question turns on the peculiar phrascology of this covenant, and I do not think we can hope for any advantage by taking time to consider, although we are not agreed upon the point. I have come to the conclusion—though the matter, I confess, is not without doubt—that the covenant is a covenant that the recited indenture is a valid and subsisting lease, and that what follows is simply matter of description, and not intended to extend the covenant to a covenant that the three lives for which it was originally granted were still subsisting. It may very well be that all parties thought the three lives were still in existence, which may account for the mode of description; but the question is, do the words used amount to a covenant that the lives are still existing? It would have been very easy to have drawn a covenant to that effect, admitting of no doubt; and I have come to the conclusion that the intention so to covenant is not shewn by the words employed. As to the habendum, precisely the same may be said of it, and I do not think it carries the matter any further; it was intended to

(1) 15 East, 530.

pass all that the defendant had to convey, and the words used there are also merely descriptive of the lease.

1871

COATES v. COLLINS.

MELLOR, J. I have come to the same conclusion, though with some doubt. I certainly was at first struck with the habendum; but, on consideration, I do not think that carries the matter further in favour of the plaintiffs. We are limited to the effect to be given to the mention of the lives, and I think the key to the covenant is to be found in the latter part of it, that the lease is not forfeited, surrendered or made void. This seems to me to shew that the introduction of the lives was for the purpose of mere description of the term and interest which passed, and was not intended as a warranty that all the lives were still existing.

LUSH, J. I cannot help regarding the words used, looking especially at their collocation, as amounting to an assertion that the three persons named, for whose lives the lease was originally granted, are still living. It is a canon of construction that you are to put a meaning on all the language used, if it be capable of a reasonable meaning, and are not to interpret or treat as superfluous any words, if capable of such a meaning. Now, it is but reasonable on the assignment of a lease for lives, that the assignee should stipulate for a covenant that the term continues as originally granted; in other words, that the lives for which it was originally granted are still in existence. Moreover, not only the recital but the habendum uses the very same words, and surely this amounts to an assertion that all three persons were still alive, and that the assignee is to hold for the three lives. Then comes the covenant that the said lease of the 10th of March, 1847, is a good and subsisting lease in the law for the lives of Walker, Jones, and Heath, and not forfeited. Why are the lives introduced in this place? They cannot be intended as mere matter of description, the date of the lease was sufficient for that; and the names moreover would not have been placed after the words "subsisting lease in the law," but before, if they had been intended as mere description, and the intention had been simply to covenant that the lease had not been forfeited or surrendered. To interpret the words as mere description would be to give no meaning to them. The same may

1871

COATES v. COLLINS.

be said of the covenant for quiet enjoyment, it treats the three as persons still existing. I therefore have come to the conclusion that the words are not mere matter of description, and that the covenant amounts to a warranty that the three persons were still alive at the date of the assignment.

Judgment for the defendant.

Attorneys for plaintiffs: *Stocken & Jupp.*
Attorneys for defendant: *Routh & Stacey.*

[IN THE EXCHEQUER CHAMBER.]

May 10.

LATTER *v.* WHITE.

Debtor and Creditor—Right of Creditor to Composition after disputing validity of Composition Deed—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192, 198.

W. A. White entered into a composition deed, by which it was agreed that the creditors should accept a composition of 10*s.* in the pound, secured by the joint and several promissory notes of White and the defendant; the notes to be delivered to trustees for the creditors seven days after the registration of the deed; the whole of White's estate to belong to the defendant, and to be realized for his benefit. The plaintiff agreed to assent to the deed, and afterwards refused to be bound by it, on the ground that his assent had been obtained by fraud. The deed was duly registered according to the Bankruptcy Act, 1861; and the promissory notes were delivered to the trustees, and tendered by them to the plaintiff, but he refused to accept them. The plaintiff then brought an action for his debt against White; and he pleaded the composition-deed, which was a valid deed on the face of it, and the plaintiff replied that the assents were obtained by fraud. The action was referred, and White being unable to prove the sufficiency of the assenting creditors, so as to satisfy the statute, consented that an award should be made by which a verdict should be entered in the plaintiff's favour. White was afterwards adjudged bankrupt. The defendant had realized White's estate. The plaintiff then brought an action against the defendant for the amount of the promissory notes given by the defendant for the composition due to the plaintiff under the deed, and also in detinue to recover possession of the notes:—

Held (reversing the judgment of the Queen's Bench), that the plaintiff was not entitled to maintain the action.

ERROR from the judgment of the Court of Queen's Bench, in favour of the plaintiff, on a special case. (1)

(1) Law Rep. 5 Q. B. 622.

1871

LATTER v. WHITE.

The action was brought to recover the amount of three promissory notes, and also in detinue to recover possession of the notes.

The facts of the case sufficiently appear in the head-note and the judgment of Kelly, C.B.; they are more fully stated in the judgments in the Court below. (1)

Day (*Murphy* with him), for the plaintiff.

J. Brown, Q.C. (*Sir G. Honyman, Q.C.*, and *Francis* with him), for the defendant.

The following authorities were cited: *Rossi* v. *Bayley* (2); Sheppard's Touchstone, p. 70; *Cox* v. *Troy* (3); *Allen* v. *Carter* (4); *Dell* v. *King*. (5)

KELLY, C.B. This action is brought under these circumstances. William Alfred White, the son of the defendant, became indebted to a number of creditors in a large amount, and amongst others to the present plaintiff. Falling into difficulties, a meeting of his creditors was held, at which the defendant attended; and at that meeting certain resolutions were passed by which it was agreed that the creditors should accept a composition of 10*s.* in the pound upon their respective debts, payable by three instalments secured by the promissory notes of the debtor and the defendant, and that those notes should be delivered to certain trustees for the creditors; and that a deed, containing a release and all the usual covenants, should be prepared and executed by the creditors, and that such deed should be a deed of composition within the meaning of s. 192 of the Bankruptcy Act, 1861; and, until the deed should be executed, the resolutions should be a memorandum of composition within the meaning of that section, binding on all parties. The defendant was induced to become surety for the payment of the composition by an arrangement made at the meeting that the goods and effects of the debtor should be realized for the benefit of the defendant. In pursuance of these resolutions a deed was executed or assented to by a majority of the debtor's creditors, but not by the plaintiff, although he had originally promised to give his

(1) Law Rep. 5 Q. B. 622.
(2) Law Rep. 3 Q. B. 621.
(3) 5 B. & A. 474.
(4) Law Rep. 5 C. P. 414.
(5) 2 H. & C. 84; 33 L. J. Ex. 47.

1871

LATTER v. WHITE.

assent. The defendant, in pursuance of the deed, delivered to the trustees the promissory notes, in payment of the composition due to the various creditors; and the property and effects of the debtor were realized for the benefit of the defendant. The trustees tendered to the plaintiff the promissory notes for the composition due to him in respect of his debt. The plaintiff denied the validity of the deed, and refused to receive the promissory notes, and commenced an action for the amount of his debt against the debtor, who pleaded the composition deed as a defence. The plaintiff, amongst other things, replied that the assent of the requisite number of creditors, whose assent was necessary to give validity to the deed, had been obtained by fraudulent misrepresentations. This action was referred to arbitration. At the hearing before the arbitrator, the debtor was unable to prove his plea, and the arbitrator made an award in favour of the plaintiff, which in effect was a verdict for the plaintiff on all the issues. The debtor was then adjudged a bankrupt. After the award in his favour, the promissory notes still remaining in the hands of the trustees, the plaintiff demanded from them the promissory notes to which he would have been entitled under the composition deed, supposing it to be a valid deed and binding on him as well as the other creditors; and that demand was refused, the reason assigned being, that the trustees had received a notice from the defendant not to deliver over the promissory notes to the plaintiff. The present action was then brought, and the declaration contains a count in detinue, and counts on the promissory notes. To the count in detinue, the plea is not possessed. It appears, independently of the question of property in the plaintiff in these notes, that the defendant is not in actual possession of them; and if, as the plaintiff contends, this was a valid deed, binding on the creditors as well as on the defendant, the defendant would have no right to repossess himself of these notes; for if the deed be a valid deed, the defendant having delivered over these notes to the trustees in pursuance of the deed, the trustees, under the express trusts of the deed, held them in trust for the different creditors in whose favour they had been made, and they would be guilty of a breach of trust to deliver them back again into the hands of the defendant. The plaintiff once had an opportunity of possessing himself of

these notes, but he failed to avail himself of it: and now he is not in a condition to recover them either from the defendant or from the person who holds them. No action can be maintained against the trustees because they hold the notes for, amongst other creditors, the plaintiff, and the only mode in which the plaintiff can obtain possession of them, to put them in suit or for any other purpose, is by a bill in Chancery against the trustees insisting on the delivery of the notes, in order that he may put them in suit; and in the mean time, until such a suit has been instituted, the trustees hold the notes in trust, and not under any circumstances which will enable the cestui que trust to maintain an action at law for their recovery. If the case had rested there, there would have been a sufficient answer to the action, but I pass away from that as being a technical defence rather than one determining the merits of the case.

If the merits of the case are looked at, it seems impossible to doubt but that this is a most unconscientious action, and that neither at law nor in equity can the plaintiff recover. It appears that the defendant, having contracted by deed to pay a composition of 10s. in the pound on the debts due by his son, entered into the contract upon the consideration, first, that he should have delivered to him the property and effects of the debtor; and, secondly, that the debtor should be released by his creditors in respect of the whole of their debts; and this was the chief consideration which influenced him in giving the promissory notes. The plaintiff having denied the validity of the deed, and thereby having refused to release the debtor, and having obtained judgment against him for the whole amount of his debt, now seeks to recover from the defendant, in addition, the amount of the composition upon the promissory notes. It seems impossible to contend that upon any principle of justice such a demand can be maintained.

The ground on which I understand this action is sought to be maintained is, that although in fact the plaintiff has sued the debtor for the entire amount of his debt, and recovered judgment in the action, yet the deed, being a deed valid and binding on him and on all the other creditors, under the Bankruptcy Act,

1871

LATTER v. WHITE.

1861, the plaintiff cannot avail himself of the judgment which he has obtained; and if he were to attempt to do so the Court of Bankruptcy would restrain him from issuing execution under s. 198 of the Bankruptcy Act, 1861. Being deprived, therefore, from ever recovering the fruits of his judgment, the plaintiff, it is said, has a right, under the deed, to recover the amount of the composition of 10*s.* payable by the defendant.

This raises the question whether the deed is a valid deed and binding on the plaintiff. If the plaintiff seeks to do away with the effect of the judgment he has obtained upon the ground that it is useless to him, because he is bound by the deed, and that he is only entitled to receive 10*s.* in the pound, for which the defendant has agreed to give promissory notes, it ought to have been found as a fact in the case, that the deed was a valid deed and binding on the plaintiff. I might content myself with saying that, no such fact having been found, the plaintiff's claim fails. It is said that we are to look at all the facts stated in the case, and consider whether they do not lead to the conclusion that the deed was a valid deed. We cannot do so, because, as this case is stated, we have no power to draw inferences of fact. I think the plaintiff's case fails. I will not say the plaintiff has estopped or precluded himself; I would rather not rest our decision upon that ground, inasmuch as the action which the plaintiff brought to recover the debt was not against the defendant but against the original debtor.

Our decision, therefore, does not rest on the ground of there being an estoppel between the parties. But looking at the substance of the plaintiff's case, and considering whether the plaintiff can maintain an action against the defendant to recover the composition when he has already obtained a judgment for the amount of the whole debt, and being of opinion that the only ground upon which the present action can be maintained is, that there is a valid and binding deed, and there being no facts stated in the case upon which it is competent for us to determine that there is such a deed, it appears to me that this action cannot be maintained, and that the decision of the Court below ought to be reversed.

1871

LATTER v. WHITE.

BRAMWELL, B. I am of the same opinion. I adopt my Brother Lush's reasons. (1) I will only add that if the promissory notes had reached the plaintiff, he must have given them back before he could have maintained an action against the son; and, if that be so, I do not see how he can maintain an action against the trustees, the lawful holders. I must also say that the trustees, who hold these notes, have held them with a duty to the plaintiff and a duty to the son; and, in my opinion, they would have been guilty of a breach of their duty to the son if they had given them up to the plaintiff.

BYLES, J. I am of opinion that the defendant is entitled to succeed. This is an action against the father upon certain promissory notes given by him on his son's insolvency. The condition upon which these promissory notes were given was the release of the son from his liability to his creditors. That condition has not been performed; the deed has been found to be bad, and the plaintiff has himself destroyed the consideration, or rendered impossible the performance of the condition; and, if so, I think it is quite plain that the defendant has a good defence to this action.

CHANNELL, B. I am of opinion that the judgment of the Court of Queen's Bench ought to be reversed. With regard to the plaintiff being estopped from alleging that the deed was binding upon him, I think that, although there might be an estoppel between the plaintiff and the original debtor in the action against him, there can be no estoppel as against the present defendant. Dismissing what has been said on the subject of estoppel in the Court below, there is quite enough in this case to shew that this action is not maintainable.

KEATING, J. I am of the same opinion; and I entirely concur in the grounds upon which my Brother Lush based his judgment in the Court below (1); and I am sure that nothing I can add would

(1) Lush, J., had dissented from the judgment of the Queen's Bench, being of opinion that the plaintiff could not maintain the action.

1871

LATTER v. WHITE.

give any weight to the judgment which has already been given by the rest of the Court.

PIGOTT, B. I do not desire to add anything to what has been said by the other members of the Court, except that I do not wish to put my judgment upon the ground of estoppel. I think the consideration for these notes entirely failed by the course which the plaintiff took in suing the son, and obtaining a judgment against him.

MONTAGUE SMITH, J. I am of the same opinion. I think the plaintiff was not the holder of these notes, and that he is not entitled to sue, either on the counts on the notes or on the count in detinue. He cannot sue in detinue unless the property passed, and here the property has not passed. I think, further, the consideration for giving the notes has entirely failed. The defendant was a surety, and his object in giving the notes, and the consideration for the notes, was that his son, the debtor, should be discharged from his debts, and that a composition should be accepted. It seems to me that by his act in repudiating the composition, and repudiating the notes, and bringing an action and obtaining a judgment against the debtor, the plaintiff has deprived the defendant of the consideration in respect of which the notes were given. I will only make this further remark, that if the contention before us is right, this consequence would follow: that every one of the creditors who assented to the deed might have brought an action, and obtained a judgment against the son, and then have still sued the defendant upon his promissory notes, which, it seems to me, would have been a great absurdity. I think the judgment of the Court below must be reversed.

Judgment reversed.

Attorneys for plaintiff: *West & King.*
Attorney for defendant: *C. P. Pritchard.*

[IN THE EXCHEQUER CHAMBER.]

WANLESS *v.* THE NORTH EASTERN RAILWAY COMPANY.

1871
May 10.

Negligence—Railway Company—Level Crossings—Injury to Foot Passenger—Railway Clauses Consolidation Act, 1845 (8 *Vict.* c. 20), *s.* 47.

The defendants' railway crossed on a level a public carriageway and footway. There were gates across the carriageway and a swing gate for the use of foot passengers. The gates on the down side of the line being open, the plaintiff entered on the railway at a time when a train on the up side was passing, intending to cross as soon as that train had passed; while he was on the railway, another train, on the down side, which he could have seen if he had looked, knocked him down and injured him. In an action against the defendants for negligence, the jury found for the plaintiff, and leave was reserved to enter a nonsuit if the Court should be of opinion that there was no evidence of negligence on the part of the defendants:—

Held (Bramwell, B., dissenting), that there was some evidence of negligence on the part of the defendants to go to a jury, inasmuch as it was the duty of the defendants under 8 Vict. c. 20, s. 47, to keep the gates closed when trains were approaching, and the fact of the gates on the down side being open was an intimation to the plaintiff that the down line was safe.

Stapley v. *London and Brighton Ry. Co.* (Law Rep. 1 Ex. 21) affirmed.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to enter a nonsuit.

The first count stated that the defendants, by their servants, so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto, upon and along a railway which the plaintiff was lawfully crossing, that the engine and train of carriages were driven and struck against the plaintiff, whereby the plaintiff was permanently injured.

Second count: That the defendants are subject to the provisions as to level crossings contained in the Railway Clauses Consolidation Act (1), and the defendants' railway crossed a certain highway

(1) By the Railway Consolidation Act, 1845 (8 Vict. c. 20), s. 47, "If the railway cross any turnpike road or public carriage road on a level, the company shall erect, and at all times maintain, good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the

1871

WANLESS v. NORTH EASTERN RAILWAY CO.

between Hylton and Sunderland on a level, and the highway and crossing were protected by gates which were put there for the purpose, in pursuance of the said provisions, and under the control and management of the defendants: yet the defendants were guilty of negligence in the management of the railway and gates, and in not providing for the safety of persons using the crossing, and in running a train across the highway and crossing, without giving any notice or signal of its approach, whereby the plaintiff, who was then lawfully using the highway and crossing by the invitation of the defendants, was injured.

Pleas: 1. Not guilty. 2, as to second count, That the plaintiff was not crossing by the invitation of the defendants, as alleged.

At the trial before Brett, J., at the Durham Spring Assizes, 1869, it appeared that the plaintiff, at the time of the accident, was fourteen years of age, residing with his stepfather, near Sunderland, and within a short distance of the Hylton station, on the Pensher branch of the North Eastern Railway, which runs from Pensher to Sunderland, of which railway the defendants are the owners and proprietors. From eighty to one hundred trains pass this station every day.

At the east end of the Hylton station, a public highway for carriages, horses, cattle, and foot passengers leading from Hylton on the north or down side of the branch railway, to Sunderland on the south or up side of that railway, crosses the railway on the level. This level crossing was in accordance with the provisions of the statutes under which the railway was constructed. There is at the level crossing on each side of the railway a large gate for the passage of carriages, horses, and cattle, and also two smaller swing gates for the passage of foot passengers; all the gates opened outwards from the railway. A gatekeeper's box or cabin is situate at the eastern corner of the gate on the south side of the railway.

---

railway, and prevent cattle or horses passing along the road from entering upon the railway; and the person intrusted with the care of such gates shall cause the same to be closed as soon as such horses, cattle, carts, or carriages shall have passed through the same, under a penalty of 40s. for every default therein:" with a proviso, that the Board of Trade may, if they think it more conducive to public safety, order that the gates be kept closed across the railway instead of across the road.

1871

WANLESS v. NORTH EASTERN RAILWAY CO.

Between 6 and 7 o'clock on the evening of the 27th of April, 1868, the plaintiff, in company with three other boys, came along the road from the village of Hylton, on the north side of the railway, to cross over the line by the level crossing.

Evidence was given by witnesses called for the plaintiff, that shortly before the boys approached the railway a cart and horse had passed over the level crossing, through the carriage gates, and that from that time till the time of the accident, the carriage gate on the north side was standing wide open, latched back, and that the boys passed through such gate. On the other hand, witnesses called for the defendants denied that the carriage gate on the north side was standing open, and gave evidence that the boys went through one of the small gates.

About the same moment that the boys reached the gate, the engine of a long train of forty-eight empty coal-trucks, which was proceeding on the up or south line of rails from Sunderland to Pensher, was just passing the gatekeeper's box or cabin. This train passed through the Hylton station without stopping. The boys had with them a dog, and some persons standing near to the gate on the north side shouted to them to keep the dog back from going through the empty trucks. The plaintiff and the other boys saw this train, and after passing the gates on the north side, they stood close to the rails on that side till the last truck of the train was passing the level crossing, when the plaintiff, having his arm round the neck of one of the other boys who was accompanying him, stepped forward with him to cross the line; but as he stepped on to the line he was struck down and seriously injured by the engine of another train of loaded coal-trucks, which was coming at that moment from Pensher to Sunderland, on the down line of rails. This train, which, like the other, passed through the Hylton station without stopping, belonged to and was driven by servants of Lord Durham; but, like all other trains using the railway, was under the control of the defendants.

The distance between the carriage gate on the north side and the rails is about twelve feet. Evidence was given for the defendants that a person crossing at the level crossing can, at any distance within eight feet from the rails on the north or down side of the

1871

WANLESS v. NORTH EASTERN RAILWAY CO.

railway, see a train coming from Pensher to Sunderland for a distance of half a mile; but evidence for the plaintiff was given, that in consequence of a projecting screen which was at the station on the north side of the line, the boys would have to be within four or five feet from the rails on that side before they could see a train coming from Pensher to Sunderland, but the boys would then be about eight or seven feet within the carriage gate on the north side.

The following rules entitled "Regulations to be observed by gatekeepers or signalmen," upon the railway, were given in evidence. Rule 174; "Unless a written order to the contrary be given by the engineer, the gates shall be kept shut across the carriage roads except when required to be opened to allow the railway to be crossed," Rule 175, "When the railway is required to be crossed the gatekeeper shall, before opening the gates, satisfy himself that no engine is in sight; he shall then shew his danger-signals and keep them exhibited until the line is clear, when he shall close the gates and alter the signals."

No signal was exhibited or other warning given by the gatekeeper or any other servant of the company to give notice of the approach to the station of the coal train from Pensher to Sunderland. Evidence was given for the defendants that the engine-driver of the coal train whistled before coming to the station; but evidence was given for the plaintiff that no whistle was heard at the station.

It was contended at the trial, that there was no evidence to go to the jury of negligence on the part of the defendants to make them liable for the injuries sustained by the plaintiff.

The jury found a verdict for the plaintiff, leave being reserved to the defendants to move to enter a nonsuit or verdict, if the Court should be of opinion that there was no evidence of negligence on the part of the defendants.

A rule having been obtained accordingly: on the 15th of June, 1869, the Court of Queen's Bench (Blackburn, Lush, and Hayes, JJ.), discharged the rule, on the ground that leaving the carriage gates open was an invitation to a foot passenger to cross the line, and an intimation that he could safely pass, and that there was therefore some evidence of negligence to be left to the jury; and

that the case could not be distinguished from *Stapley* v. *London and Brighton Ry. Co.* (1)

Manisty, Q.C. (*Kemplay* with him), for the defendants. The judgment of the Court below ought to be reversed. There is no evidence of any negligence on the part of the defendants to make them liable to the plaintiff. No duty is imposed on the defendants to keep the carriage gates closed as against foot passengers; the duty imposed on them by s. 47 of 8 Vict. c. 20 is to keep the gates closed except when horses and carriages are passing. There being no duty imposed on the defendants with reference to the plaintiff who is a foot passenger, they cannot be guilty of negligence in leaving the gate open through which the plaintiff is said to have passed. The plaintiff was himself the author of the accident; he carelessly went on the line and was injured, he cannot therefore maintain this action. The case is like *Mangan* v. *Atterton* (2), where it was held that a boy, having caused the injury to himself by his own act, could not maintain an action against the defendant who had placed a machine in a public place for sale. Assuming, however, that *Stapley* v. *London and Brighton Ry. Co.* (1) is correctly decided, and that if the carriage gates which fence the railway are left open, it is an invitation to a foot passenger to cross the line, and an indication to him that it is clear, still in the present case the gates being open cannot be considered as an invitation to the plaintiff to cross the line, for the plaintiff must have seen that the line was not clear, as a train was passing at the time he entered on the railway; and if he had taken common precaution he must have seen the train which injured him was coming. It cannot in any sense be said that he was invited to come on the line and stand close to the passing train. Persons crossing a railway on a level are bound to use reasonable care: *Stubley* v. *London and North Western Ry. Co.* (3): *Skelton* v. *London and North Western Ry. Co.* (4); if the plaintiff had used reasonable care he would not have been injured. He suffered the injury he received through his own imprudence and not from any negligence on the part of the defendants.

(1) Law Rep. 1 Ex. 21. (3) Law Rep. 1 Ex. 13.
(2) Law Rep. 1 Ex. 239. (4) Law Rep. 2 C. P. 631.

1871

WANLESS v. NORTH EASTERN RAILWAY CO.

Quain, Q.C. (*Lewers* with him), for the plaintiff, was not heard.

KELLY, C.B. It is unnecessary to hear counsel in support of the judgment of the Court below, though I regret that my Brother Bramwell differs in opinion from the rest of the Court; the majority are, however, agreed that the judgment should be affirmed, and my Brother Bramwell does not desire any further argument.

The action is brought against the defendants for injuries alleged to have been occasioned by their negligence. At the trial the evidence as to whether the gates on either side of the railway were open or shut was conflicting; the jury, however, found a verdict for the plaintiff, and the only question before us is, was there any evidence to go to the jury of negligence on the part of the defendants?

It appears from the case that there was a level crossing at the station in question, not merely for foot passengers, but for carts and carriages, and under the provisions of the Act of Parliament, gates were erected across the road on each side of the railway, so as, when closed, to fence in the railway. It is the opinion of the majority of the Court that it was the duty of the defendants to keep these gates across the road shut when any trains were expected to pass; and that they should be left open only when no trains were expected; and that whenever the gates or either of them are left open it is an intimation to the public, who may have to pass across the railway either upon foot or with carts and carriages, that they can pass in safety. It appears further that at a time when a train was actually passing, and when another train was about to pass, and did actually pass within a few minutes afterwards, one of the gates, instead of being shut, as it ought to have been, so as to have warned the public that no one could pass in safety across the railway, was left open; and while the gate was thus left open, while one of the trains was actually passing, and another train was about to pass, the plaintiff came to the railway, and seeing the gate open walked upon the railway; and almost the moment afterwards the second train to which I have alluded passed along the railway, knocked him down and inflicted upon him the injuries in respect of which he has brought this action.

The case certainly shews that the plaintiff might, when he had entered on the railway, or even before entering on the railway, if he had looked on either side of him as far as he could—at least that is the construction I have put upon the statement in the case—have been enabled to see that the train which inflicted the injury upon him was about to pass along the railway; and therefore that it would have been his duty to stop, and of course he would have stopped if he had seen that train coming. I am far from saying that these circumstances, which appear to have been proved at the trial, were not evidence of contributory negligence; for I cannot say that anyone crossing a railway, though it might have been intimated to him that he may cross in safety, still when he is upon the railway, ought not to look upon one side, and upon the other to see whether a train is approaching. But we are not called upon to determine any question of contributory negligence. Assuming that there was evidence of contributory negligence which might well have justified the jury in finding a verdict for the defendants, the question that is now before us is whether upon the whole of this case there was any evidence which should have been left to the jury of any negligence on the part of the company. Was it not negligence on the part of the company or their servants to leave the gate open, at a time when the second (I will not refer to the first) train was about to pass along this railway at the point at which it was crossed by the level crossing? I am clearly of opinion that there was a duty imposed upon them to keep the gate shut, and they were guilty of negligence in leaving it open: at all events there was evidence of negligence to be left to the jury. Mr. Manisty's argument was that these gates are only kept shut for the protection of persons passing along in carts and carriages: the majority of the Court are of opinion that the leaving open gates under circumstances like these is an intimation not only to persons who may be passing in carts and carriages, but to all who are about to cross the railway, that they may cross in safety. If it were not so, this absurd consequence would result, that, if a gentleman had been driving his carriage across this railway, and had seen this gate open, and had advanced upon this railway, and at the same moment of time the plaintiff had crossed the railway on foot, and a train had come and knocked

1871

WANLESS v. NORTH EASTERN RAILWAY CO.

down the horses and the carriage and also knocked down the plaintiff, the owner of the horses and the carriage might maintain an action for negligence, and that there would be negligence as regards him, but that the plaintiff could not, and that there would be no negligence as regards him. *Stapley* v. *London and Brighton Ry. Co.* (1) appears precisely in point. That was a case in which the gate was left open upon a crossing of this description, for carts as well as passengers on foot. And it was held that the mere leaving open of the gate without reference to any question of contributory negligence, when trains were about to pass or expected to pass, was negligence on the part of the company. Under these circumstances I think the plaintiff was entitled to maintain the action, and upon the form of this rule we are bound to affirm the judgment of the Court of Queen's Bench.

BRAMWELL, B. I am of opinion that the judgment of the Court below should be reversed. The question raised by the rule is, whether there was any evidence to go to the jury of any act of negligence or wilfulness in the defendants which brought about or conduced to this accident. I think there was no evidence of any negligence or wrongful act on the part of the defendants which brought about this accident. It is said that the defendants were under a duty to keep the carriage gates closed. I am of opinion that they were not under any absolute duty to do so. They are under a relative duty only. They are under a duty to keep them closed with the object which is stated in s. 47 of 8 Vict. c. 20. They are to keep the gates closed, except during the time when horses, cattle, carts, or carriages passing along shall have to cross the railway; and the gates shall be so constructed, as, when closed, to fence in the railway and prevent horses or carriages passing along the road from entering upon the railway. And the person entrusted with the care of such gates shall cause the same to be closed as soon as such horses and carriages shall have passed.

The test as to whether there is negligence or not is to ascertain whether the act complained of would have been wrong if it had been a wilful one. Now, suppose the person having the charge of

(1) Law Rep. 1 Ex. 21.

the gates, not carelessly, but wilfully and designedly, left them open, there being a view along the road in each direction for half a mile, and no horse or carriage in sight, could anybody say he had intentionally done anything wrong? If leaving the gates open wilfully is not wrong, neither is it wrong to leave them open in what may be called a negligent way, that is, from inattention; because no horse or carriage being in sight, it was unnecessary to keep the gates closed to prevent them from entering on the railway. What probably happened was, that a cart had gone through; that the gatekeeper was on the side at which the cart had left the railway; that he had shut the gate there; that he could not cross to the other gate on account of the train that first passed, and there being no immediate necessity to shut the gate, no other cart being in sight, it was left open, as the plaintiff's witnesses say. Therefore there is no evidence of anything wrong, either wilfully or negligently. But, further, even if there were, inasmuch as wilful negligence is a relative term, there was no evidence of any want of care to which the plaintiff was entitled, or of the want of which he could complain. It is said that the plaintiff was led into temptation, and that he reasoned thus: "These gates are only open when no train is coming; therefore no train is coming; therefore I can safely cross; therefore I will cross;" and so the plaintiff got hurt. Nobody can think that the plaintiff—a boy—did reason with himself in this way. It is a common thing to see people stop at a crossing until a carriage goes by, and then, as though there were only one carriage in the world, step off the curb, and find themselves in the face of another carriage. That is what happened here. The plaintiff saw the one train, and it never occurred to him that there should be another. But supposing that he did reason upon the matter, he reasoned ill, and must take the consequences. The argument is, that he reasoned, that because the gate was open, therefore no train was in sight. If he had said, because the gate was open and a cart was passing across the line, therefore no train was in sight, there would have been some foundation for his reasoning. I am of opinion that the gate might properly be open if no cart or carriage or horse was in sight.

There is another aspect of the case. I will suppose he reasoned

1871

WANLESS v. NORTH EASTERN RAILWAY CO.

well. Then I say he has no right to act on his reasoning when he can use his eyes and see. The case is this: "I reasoned, and my conclusion was a reasonable one, that there was no train; therefore I stepped on to the line." Has anybody any right to act upon his reasoning, and then to say it was the fault of another, and not his fault, that mischief happened to him? Suppose that a boy had a looking-glass or other valuable chattel entrusted to him by a tradesman to deliver to a customer. He was coming across the line with it, just as the plaintiff was, and, instead of being hurt himself, the looking-glass was knocked out of his hand and smashed to pieces. The person who had committed it to his care brings an action against him for negligently carrying it so that it broke. It would be no defence to say, "It is true, if I had looked I should have seen the train; but the railway led me into temptation. I reasoned, and came to the conclusion that I might safely cross." Or, suppose a boy had been trundling a barrow with a large stone or some other solid body upon it, and it had got underneath the train, and the train had been thrown from the line and somebody killed, and he had been indicted for manslaughter, it would be no defence to say, "I considered that I might cross with safety." Or, suppose that an omnibus with passengers was on the road, and the coachman says, "I thought the line was clear, but I admit, when I got where I did, I could see it was not clear, nevertheless I went on, for I trusted to my own conclusions;" would not the passengers have a good action against him for negligence, and could not they say, "The company may have been wrong, but it was your doing?" It seems to me clear that they would.

Let us suppose that a person was bound to fence a precipice, and that another was to go to the place, and say, "There is no fence; I will jump off;" could it be said the act happened through the fault of the man who was bound to fence? He would have no right of action. Suppose the person had seen the fence, and had fallen over, would he have any right of action then? I say, no. I say, that when it is a man's fault that he has done the thing from negligence, he is as little entitled to maintain an action as though he had done it from his own wilfulness. The plaintiff here having the means of avoiding this accident, did not do so; it is as much making it his own act, although it was only negligence

on his part, as though he had done it wilfully. Therefore, upon that ground I should say it is not a case in which the defendants' negligence conduced to the accident. Negligence may have given an opportunity for it, but it is the boy who has availed himself of the opportunity, and done himself the mischief. On that ground, also, I should say that the judgment of the Court below was wrong. It is said it would be absurd, that if a carriage and a person on foot crossed the line at the same time through an open gate, and both were injured by a passing train, to hold that there was negligence on the part of the railway quoad the carriage, but not quoad the person. It is to be observed, in that case, that one of my arguments would fall to the ground, because, if the carriage were in sight, it would be wrong not to keep the gates shut; and then the boy might argue with more propriety, that it was safe for him to cross; for he might say, "I see a condition of things which makes it the duty of the railway company to shut the gate." But in that case, if the driver of the carriage could have seen the train by looking, he would have no right to trust to his speculation; and when the injury happened, to have said, "I did not think it would have happened. I shut my eyes, and did not look as I should have done, for I trusted to my own reasoning." Upon these grounds it seems to me that the judgment should be reversed. I think there was no negligence that conduced to the accident. Further, even if there was any negligence on the part of the defendants, which induced the plaintiff to go so near the train as he did, I think he brought the mischief on himself.

CHANNELL, B. I am of opinion that the judgment of the Court of Queen's Bench should be affirmed. I come to that conclusion, looking at the question submitted to us, whether there was evidence that should have been submitted to the jury in favour of the plaintiff's case, not whether the jury ought to have found a verdict for the plaintiff or for the defendants. There is an Act of Parliament (8 Vict. c. 20, s. 47) which appears to me to bear upon it, and there are rules which the company have made, and there is, further, the usage which they have adopted in conformity both with the Act of Parliament and the rules. Now, can it be said

1871

WANLESS v. NORTH EASTERN RAILWAY CO.

that there was no evidence to go to the jury of negligence in leaving these gates open, contrary to the Act of Parliament and to the rules of the company, and contrary also to the usage they had adopted, at least in the majority of instances, with reference to those gates? I think there was evidence. Admitting Mr. Manisty's argument to be well founded, that the leaving the gates open, at most, amounted to an invitation to enter on the immediate neighbourhood of the railway, and did not relieve the plaintiff from the necessity of taking ordinary precaution, and that the plaintiff should, so to speak, use his eyes: still it seems to me there is fair ground to contend, when the plaintiff had got on to the railway through the gates and had sustained no injury from the first passing train, that the passing of the second train, the one that did him the injury, took him by surprise, and prevented his exercising that coolness and calmness of observation which, but for that, he would have done. I do not think that he is disentitled to maintain this action merely upon the ground that with greater care or presence of mind he might have escaped. At any rate, I think we cannot, without overruling the case of *Stapley* v. *London and Brighton Ry. Co.* (1), say there was no evidence to go to the jury.

BYLES, J. I regret that the judgment of the Court has not the concurrence of my Brother Bramwell. The question is not, as I understand the case, whether there was contributory negligence on the part of the plaintiff, but whether there was any evidence of negligence on the part of the defendants. At the trial it was contended on the part of the defendants that there was no evidence to go to the jury of negligence, so as to make them liable. The jury having found a verdict for the plaintiff, leave was reserved, in case the Court should be of opinion that there was no evidence of negligence on the part of the defendants, to enter a nonsuit. Now I think there was evidence of negligence on the part of the defendants; the weight of it is not material. First, the gate is left open; secondly, it is improperly left open and against the rules; and thirdly, I agree with what has been said by the Lord Chief Baron, and I shall not

(1) Law Rep. 1 Ex. 21.

further enlarge upon it, that the leaving open of the gate is an indication that the line is clear, and an indication improperly given, and it seems to me to be evidence of negligence on the part of the company.

KEATING, J. I am of the same opinion. I think there was evidence to go to the jury, and which could not have been withheld from them, of negligence on the part of the defendants contributing to the accident. I agree with my Brother Bramwell that, supposing there be shewn negligence on the part of the defendants, but not contributing to the accident, in that case the company could not be made responsible. Now, if there were no duty to shut the gates at the time in question, then I agree with my Brother Bramwell that I see no evidence here of negligence on the part of the company that could be said to contribute in any way to the accident. But it appears to me that it was the duty of the servants of the railway company to have the gates shut at the time the two trains, or about the time the two trains were passing. It seems to me that it was a time at which caution on the part of the company was peculiarly necessary; because it must be taken to have been within the knowledge of the servants of the company that that state of things existed. Under those circumstances ought the gates to have been shut? It is suggested not necessarily, because it is not shewn that at that time there was any cart coming up. That does not appear one way or the other; certainly there is no evidence to shew that there was any carriage at that moment coming up along the high road; but a cart had passed, and if the gate was then open it appears upon the evidence that the cause of its being open was that, having been open, it was not shut after having been opened by the servants of the company. In that respect the case seems to me to be stronger than the case of *Stapley* v. *London and Brighton Ry. Co.* (1); because there, in the judgment of the Court delivered by my Brother Channell, it is stated as one of the facts that it did not appear how the gate had been left open, and it was consistent, therefore, that the gate might have been left open without any fault whatever on the part of the railway company; but here the gate being open certainly arose from the fact of

(1) Law Rep. 1 Ex. 21.

1871

WANLESS v. NORTH EASTERN RAILWAY CO.

its not having been shut after the cart had passed. Therefore, if at the time the trains are passing up and down the gates ought to have been shut (as I think they ought), in this case the gates were wrongly open. Now, I quite agree that the plaintiff may have been somewhat mistaken in his mode of reasoning; I daresay that if he had had time to think, and had heard the matter put to him on each side, he might have come to the conclusion that it would have been safer for him not to go on the line. But what was his position? He sees the gate open, he goes in; they shout to him to stop until a passing train on the other side should have passed. His eye is upon that train, and when that train to which his attention is called has passed, he imagines—somewhat hastily, perhaps, but not altogether, I think, unnaturally—that the danger was at an end. He little supposed that a train was to come past that gate which was still wide open at the moment, and he stepped on the line. I think that there was evidence of contributory negligence on his part to go to the jury; and I by no means mean to convey that, if I had been upon the jury, I would have found the same verdict the jury did; but that is not the question for us; the question for us is, whether those gates ought then to have been shut, and whether their being open at the time they were open, under all the circumstances of the case, was or was not an act of negligence on the part of the company. Who is to judge of that? It seems to me the jury only could judge of it. It would not necessarily follow as a universal proposition, that because a gate is open, therefore, the company is liable. I think that the gate being open might or might not be, according to circumstances, an invitation to the plaintiff to go on the railway. Whether it was or was not would be, under the circumstances, a fair question for the consideration of the jury; therefore, I think that there was evidence to go to the jury, and that the judgment of the Court below should be affirmed.

PIGOTT, B. I am of the same opinion. I think the judgment of the Court below should be affirmed. I think that there was evidence of negligence on the part of the defendants. I think it may be very questionable whether it was ever politic on the part of the legislature to sanction level crossings, but be that as it may,

1871

WANLESS v. NORTH EASTERN RAILWAY CO.

the legislature intended to protect the public by passing s. 47 of the Railway Clauses Consolidation Act (8 Vict. c. 20). I think that we should not relax any of that security which has been obtained from railway companies on behalf of the public. I think that s. 47 does impose a duty upon the railway company, that the gates shall at all times be closed against the highway, whether there is a train passing or not passing, and the gates are only to be opened when horses or other things want to pass across the railway. In the present case the gate across the highway, instead of being as it should have been, closed against the highway, was open, and there was a train passing on the other side of the railway, the south side, and none on the north side, and the plaintiff came through that gate. Allowing a train to pass along the highway with the gates open, so that persons could at the same time come from the highway while the train was passing, is in itself, without anything more, as it seems to me, evidence of negligence on the part of the railway company. That circumstance of itself would be sufficient to dispose of this rule, but I am not disposed to rest my judgment simply upon that ground, because I am clearly of opinion that the question of contributory negligence here was a question which could not be withdrawn from the jury—that it was not a case in which it clearly appears that the accident was the result of the plaintiff's own act of contributory negligence; because I think the mere circumstance of the gate being left open so that he might pass through it was a circumstance which might have thrown the plaintiff off his guard; for a foot passenger has as much right to pass through the carriage gate as he has to pass through the side gate. I think it was a case in which, in all probability, the plaintiff was imprudent. The question would therefore be for the jury, whether he did under these circumstances so contribute to the accident, that in fact he substantially contributed to it, and is disentitled to recover against the railway company. I think if the jury were of opinion that there was enough, looking to the age of the plaintiff and other circumstances, to throw him off his guard, that he might well be excused for what he did, though he did not act in the most prudent way, and that there was quite enough to entitle the jury to say that the accident was due to the negligence of the railway company, and not to the negligence of the plaintiff.

1871

WANLESS v. NORTH EASTERN RAILWAY CO.

I do not say that I should have found as they did if I had been upon the jury. I think in all probability I should have found against the plaintiff.

MONTAGUE SMITH, J. Upon the limited leave reserved, I agree with the majority of the Court that the judgment of the Court of Queen's Bench should be affirmed. I cannot say that there was not some evidence of negligence on the part of the company which conduced to the accident. I confess I am not, however, without doubt upon the latter branch of the proposition, whether, assuming there was negligence, it conduced to the injury, because, after the plaintiff got within the gates, it may be said that the effect of the absence of warning, which arose from the open carriage gates, should have been removed from the plaintiff's mind by the fact that a train actually passed before his eyes; and then that he should have looked to see that no other train was passing before he crossed, and that not having done this, he ran into the danger, and was the author of the accident that befell him. I also think that there is great weight in the considerations which have been put forward by my Brother Bramwell, but it strikes me, upon the whole, that those were considerations for the jury, and that we could not take upon ourselves to say, upon this limited leave reserved, that there was no evidence which should have been submitted to the jury on that branch of the inquiry. If the whole case had been reserved, I should have been more disposed to agree with my Brother Bramwell. It is only upon the limited leave reserved that I concur in the judgment which has been given by the majority of the Court.

Judgment affirmed.

Attorney for plaintiff: *J. Scott.*
Attorneys for defendants: *Williamson, Hill, & Co.*

BECK, APPELLANT; STRINGER, RESPONDENT.

1871
May 3.

Petroleum Act, 1868, 31 & 32 *Vict. c.* 56—*Sufficiency of Test under ss.* 1, 5, 6, 8, *and Schedule.*

The appellant was convicted by justices under the Petroleum Act, 1868 (31 & 32 Vict. c. 56), s. 4, for keeping and exposing for sale, without a licence, petroleum oil which gave off an inflammable vapour at a temperature of less than 100 degrees of Fahrenheit's thermometer.

At the hearing it appeared that the respondent, the inspector of weights and measures, in making the test as authorized under s. 6, had allowed the thermometer to rest on the bottom of the vessel in which the petroleum was, so that, the vessel being two inches deep, and filled with petroleum, as required by s. 8 and schedule, the thermometer was inserted to the depth of two inches; and it was objected on behalf of the appellant that the test was not legally made as required by the schedule, which says that the thermometer shall be inserted in the oil so that the bulb, which is to be about half an inch in diameter, shall be immersed about one and a half inches beneath the surface.

It was also proved that the respondent had used, to ascertain the flashing point, a spirit lamp with a small wick, having a "very small flame," which is all the schedule requires; but it was shewn, on behalf of the appellant, that waxed twine was the means used by scientific persons for the purpose, which had a still smaller flame.

The justices ruled that there had been sufficient compliance with the schedule on both points, and that the only way the appellant could displace the test was by having a further test made by a "public analyst," as allowed by s. 6. This he declined.

On a case, under 20 & 21 Vict. c. 43, raising the question whether the test was legal on the above two points, and the appellant rightly convicted:—

Held, that the Court could not say that the test was not legal; and that the conviction must be affirmed.

CASE stated by Justices of Kent under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant, under s. 6 of the Petroleum Act, 1868 (1), charging that

(1) By 31 & 32 Vict. c. 56, s. 6: "It shall be lawful for any inspector of weights and measures, or other person or persons duly appointed to inspect weights and measures under 22 & 23 Vict. c. 56, and the Acts therein recited, at all reasonable times to inspect and test all petroleum kept, offered, or exposed for sale; and if, upon such inspection and test, any description of petroleum shall be found kept or offered or exposed for sale as aforesaid, contrary to the provisions of this Act or of the Petroleum Act, 1862, the same shall be liable to be seized and, upon conviction, forfeited; and such person so examining the same shall retain a sample thereof, and the person or persons so offending shall be liable, for any such offence, to any penalty not ex-

1871

DEEK v. STRINGER.

the respondent, being inspector of weights and measures for the district of, &c., on the 8th of November, 1870, did enter a certain building within his jurisdiction wherein petroleum was then kept, offered or exposed for sale; and that he did inspect and test all

---

ceeding five pounds: Provided always that, if the person or persons in whose possession such petroleum shall be found, as aforesaid, shall claim to have a further test made on their behalf, the magistrate before whom complaint of the said offence may be laid shall call before him the public analyst provided by s. 2 of 23 & 24 Vict. c. 84, or, if no such analyst has been provided, some other person having competent chemical knowledge, who shall test a portion of the sample so retained as aforesaid in the manner hereinafter provided, and shall give evidence of the result of such test . . ."

S. 8: "The temperature at which petroleum gives off an inflammable vapour shall, for the purposes of the Petroleum Acts, be tested in manner set forth in the schedule."

Sch.: "Directions for applying the Flashing Test to Samples of Petroleum Oil:—The vessel which is to hold the oil shall be of thin sheet-iron; it shall be two inches deep and two inches wide at the opening, tapering slightly towards the bottom; it shall have a flat rim, with a raised edge one quarter of an inch high round the top; it shall be supported by this rim in a tin vessel four inches and a half deep and four and a half inches in diameter; it shall also have a thin wire stretched across the opening, which wire shall be so fixed to the edge of the vessel that it shall be a quarter of an inch above the surface of the flat rim. The thermometer to be used shall have a round bulb about half an inch in diameter, and is to be graduated upon the scale of Fahrenheit, every ten degrees occupying not less than half an inch upon the scale.

"The inner vessel shall be filled with the petroleum to be tested, but care must be taken that the liquid does not cover the flat rim. The outer vessel shall be filled with cold, or nearly cold, water; a small flame shall be applied to the bottom of the outer vessel, and the thermometer shall be inserted into the oil so that the bulb shall be immersed about one and a half inches beneath the surface. A screen of pasteboard or wood shall be placed round the apparatus, and shall be of such dimensions as to surround it about two-thirds, and to reach several inches above the level of the vessels.

"When heat has been applied to the water until the thermometer has risen to about ninety degrees Fahrenheit, a very small flame shall be quickly passed across the surface of the oil on a level with the wire. If no pale blue flicker or flash is produced, the application of the flame is to be repeated for every rise of two or three degrees in the thermometer. When the flashing point has been noted, the test shall be repeated with a fresh sample of the oil, using cold, or nearly cold, water as before, withdrawing the source of heat from the outer vessel when the temperature approaches that noted in the first experiment, and applying the flame test at every rise of two degrees in the thermometer."

Other sections of the Acts of 1862 and 1868 are given post p. 505, n (2).

the petroleum there; and that the building was occupied or used by the appellant; and that, upon such inspection and test, it appeared that certain of the petroleum gave off an inflammable vapour at a temperature of less than 100 degrees of Fahrenheit's thermometer, the said building being within fifty yards of a dwelling-house or building in which goods were stored, the appellant not having a licence by the local authority, contrary to the statute.

The appellant was convicted of the said offence, and adjudged to pay a penalty of 10*s*.

Upon the hearing it was proved, upon the part of the respondent, that on the 8th of November, 1870, he had visited the appellant's shop, and had there found certain oil, which he had tested for the purpose of ascertaining whether it was petroleum within the meaning of the Act—that is to say, whether it gave off an inflammable vapour at a temperature of less than 100 degrees of Fahrenheit's thermometer, and found that, according to the test used by him, the oil did give off an inflammable vapour at a temperature of less than 100 degrees. Upon cross-examination by the attorney for the appellant the respondent produced the apparatus by means of which he had made the test, and it appeared that such apparatus was not provided with any means by which the thermometer could be suspended in the oil, so that the respondent, in making the test, was obliged to, and did in fact, rest the bulb of the thermometer upon the bottom of the inner vessel containing the petroleum, whereby the bulb of the thermometer was inserted in the petroleum to the full depth of the inner vessel, which was two inches deep, as required by the schedule of the Act. Whereupon the attorney for the appellant objected that the test had not been made in a legal manner—that is to say, in the manner required by the schedule; and in support of such objection he called as a witness a Fellow of the Chemical Society, and a person experienced in the testing of petroleum, as an expert; and he deposed that the apparatus of the respondent was not in a complete state, for want of a standard with fastening screws, which ought to be attached thereto for the purpose of holding the thermometer inserted in the petroleum at the depth required by the Act, viz., about one and a half inches; and he pointed out to the

1871

BECK v. STRINGER.

justices a screw-hole attached to the brim of the apparatus, which, he explained, was intended for the purpose of attaching a standard for suspending the thermometer. The same witness also deposed that the insertion of the bulb of the thermometer to the very bottom of the oil vessel might, in his judgment, fail to give an accurate result, for that, when oil is heated quickly, the heated particles rise to the surface, and until the whole of the oil contained in the inner vessel is heated equally throughout, the lower part thereof is of a lower temperature than the surface which gives off an inflammable vapour, and that a thermometer inserted in such lower part would indicate such lower temperature, instead of the higher temperature of the surface, at the time the flashing point was reached; but he admitted, on cross-examination, that he was unable to state whether the placing of the bulb at the bottom of the oil vessel would cause any different result in the test, as he had never tried the experiment.

Upon this point the justices decided that the requirements of the Act had been complied with, because, although the schedule prescribes that the thermometer shall be inserted in the oil, so that the bulb shall be immersed about one and a half inches beneath the surface, yet that exact depth is not required; and because the time stated to have been occupied by the respondent in heating the oil appeared to the justices to be sufficient to insure the equal heating of the oil throughout.

It further appeared, upon the evidence of the respondent, that for the purpose of passing a very small flame quickly across the surface of the oil, in order to ascertain the flashing point as required by the schedule, he had used a small lamp containing spirits of wine, with a cotton wick inserted in such spirits of wine, and drawn out therefrom through a small tube, and the portion of the wick which protruded from the mouth of the tube was ignited, in order to supply the very small flame required; and upon cross-examination the respondent stated that such lamp had not been furnished to him by the philosophical instrument maker who had supplied the rest of the apparatus, but that he had subsequently procured the same elsewhere. Whereupon the same witness for the appellant deposed that in his opinion such means of producing the very small flame required by the Act was

improper, inasmuch as the size of the flame produced by the spirit lamp would vary according to the extent to which the cotton wick might be pulled out from the tube, so that it was almost impossible the flame would ever be of the same size in any two instances of testing. Also, that the flame of the lamp would be apt to vary, as the spirit would flow down the tube more or less freely, so that the inclination at which the lamp might happen to be held would make a difference in the result. Also, that the spirit flame produced by the lamp was but indistinctly visible in daylight, so that the real size thereof could not be clearly discerned; also, that the heat of a flame from spirits of wine was very much greater than that of most other flames, and too great for the purpose in question; and that in passing such a flame over the petroleum, it would, if passed too slowly, communicate its own heat to the surface, and thus raise the temperature of the surface to a higher degree than that of the body of the petroleum heated only by the hot water in the outer vessel. On the other hand the witness stated that the proper mode, in his opinion, of producing the very small flame required, was by a piece of very fine waxed twine, the flame from which was necessarily uniform in size and brilliancy, and could not vary at the pleasure or by the mistake of the operator, and that the heat thereof was very trifling, so that it could not impart an exceptional temperature to the surface of the petroleum under test. Also, that the waxed twine was the means actually in use by Dr. Letheby and other eminent analysts; and he supposed that the reason why philosophical instrument makers did not supply with the apparatus any lamp or other means of producing the very small flame in question, was because it was well understood that such flame was to be produced by such fine waxed twine. The witness exhibited a piece of such fine waxed twine ignited in comparison with the flame from the respondent's spirit-lamp. The justices find as a fact that both the flames so produced were very small flames, although that from the waxed twine was the smaller of the two.

The attorney for the appellant then contended that the Act not having defined the flame required, otherwise than as a very small flame, and not having prescribed the mode of producing it, it was competent to the appellant to shew by evidence what was

1871

BECK v. STRINGER.

the proper size of flame, and the proper mode of producing it; and called upon the justices to declare, upon the evidence before stated, that the flashing of the petroleum by the respondent, by means of a flame produced by a spirit-lamp, was not in accordance with the Act and the schedule thereto. The justices, however, decided that as the Act did not prescribe the manner in which this testing flame shall be produced, the respondent was at liberty to use any means by which a very small flame could be produced. And as the justices found on the evidence that he had, in making his test, used such a flame; they held that on this point he had satisfied the requirements of the Act.

The attorney for the appellant then called witnesses for the defence, by whom it was sworn, that the appellant had purchased the petroleum from a wholesale dealer who had received with the oil a certificate that it had been tested, and that its flashing point was 104 degrees of Fahrenheit's thermometer; also, that a portion of the appellant's petroleum had since been carefully tested by another competent person, who had used fine waxed twine to produce the very small flame required for flashing the oil, and that upon such subsequent test the oil did not give off an inflammable vapour at a less temperature than 100 degrees of Fahrenheit's thermometer. And also that other parts of similar petroleum, part of the same consignment, and bought of the same wholesale dealer under the same certified test, had been tested by the respondent himself upon the premises of two other retail dealers in Tunbridge Wells, and had been passed by him as not giving off an inflammable vapour at a less temperature than 100 degrees.

The justices having heard the evidence, were of opinion that the respondent's test had been made legally in accordance with the statute; and decided that the only way in which the appellant could displace such a test, was by claiming to have a further test made by a public analyst or competent chemist as mentioned in the proviso to s. 6; and they inquired of the appellant if he claimed to have such further test, whereupon the attorney for the appellant answered that he could not do so without admitting the legality of the test made by the respondent, which he disputed, and that he preferred to rely on the evidence already given for

the defence, in proof of the oil not being petroleum within the meaning of the statute.

If the Court shall be of opinion that, upon the facts before stated, the justices were right in deciding that the test made by the respondent was made according to law, both upon the first and second points, and that they were therefore bound to convict the appellant unless he claimed to have a further test made pursuant to s. 6, then the conviction was to stand, otherwise the information was to be dismissed.

Grantham, for the appellant, contended, first, that the insertion of the thermometer in the petroleum to the full depth of the inner vessel was not in compliance with the mode of testing required by the Act, but was a material variation, such as might affect the result of the test; and that not being therefore in conformity with the statute, no conviction could take place founded on such test. Secondly, that the statute not having defined with precision the size of the very small flame required for flashing the petroleum, or the proper means of producing it, the justices were bound to consider the evidence tendered on the part of the appellant on those points, and that such evidence having shewn that the flame used by the respondent in making his test was not produced in the same way as that said to be ordinarily used by eminent analysts, nor such as is required and intended in the statute, the justices should have dismissed the information, on the ground that the mode of testing required by the Act had not been complied with. Thirdly, that the justices should have taken into consideration the evidence given in defence, for the purpose of shewing that the oil in question was not in fact (if properly tested) petroleum within the meaning of the Act; and that the appellant was not bound to claim under the proviso in s. 6 a further test by a public analyst, or other competent chemist, as the only means of displacing the test made by the respondent.

Anderson, for the respondent, was not heard.

COCKBURN, C.J. The magistrates having heard the evidence of the respondent, and also the evidence for the appellant that the test had not been properly applied, came to the conclusion that the provisions of the statute as to the mode of applying the test had

1871

BECK v. STRINGER.

been substantially complied with; and I cannot say that the magistrates were wrong. The only appeal, if the party is dissatisfied with the result of the test, is that some one having competent chemical knowledge may be called in to apply the test. In the present case, the offer of the magistrates was refused, and they were right in deciding that when they had once come to the conclusion that the test had been made, the only course to pursue was to call in the analyst if the appellant wished it. They were not bound to adopt the view of the appellant's witnesses. They were the judges of whether the evidence was satisfactory as to the test, and we cannot interfere, unless we can clearly see that the conclusion they have come to must be wrong.

BLACKBURN, J. I am of the same opinion. The first Act (25 & 26 Vict. c. 66, s. 1) gave a definition of petroleum, by which petroleum was to include any product of petroleum giving off an inflammable vapour at a temperature of less than 100 degrees, but the Act left it open how this degree of inflammability was to be ascertained; the second Act remedies this, and by s. 6, an inspector is to inspect and test all petroleum kept, or offered, or exposed for sale; and upon the test of this authorized officer the section provides that the offender may be charged with the offence of keeping or selling petroleum contrary to the Act; and that when before the magistrates, if the person charged desires a further test, the magistrates shall call before them the public analyst to re-test the petroleum. That appeal the appellant in the present case refused to take. By s. 8, and the schedule, the mode of testing is given, and the magistrates have to see how the officer has applied the test; this is a question of fact for them. One of the directions is that a very small flame is to be passed over the surface of the oil; that was done in the present instance. But it is said a smaller flame might have been used; very probably; but, nevertheless, the directions have been followed. The other objection is that the bulb of the thermometer touched the bottom of the vessel, and the bulb was therefore immersed two inches, instead of about an inch and a half, and this, it is said, would make a difference. I cannot say whether this was such a deviation from the directions as to make the test no test; if it did

1871

BECK v. STEINER.

make a difference, and an analyst had been called in, he would have shewn whether the result was false. On the whole, I cannot say the magistrates were wrong in upholding the test of the inspector, notwithstanding the appellant's evidence.

Judgment for the respondent. (1)

Attorneys for appellant: *Langham & Son.*

Attorney for respondent: *Philip Wood, for Stone, Wall, & Simpson, Tunbridge Wells.*

JONES, APPELLANT; COOK, RESPONDENT.

May 7.

Petroleum Acts, 1862 *and* 1868, 25 & 26 *Vict. c.* 66, *s.* 1; 31 & 32 *Vict. c.* 56, *ss.* 3, 4—*All Petroleum within the Acts although not giving off an inflammable Vapour under* 100 *degrees of Fahrenheit.*

By the Petroleum Act, 1862, s. 1, "petroleum," for the purposes of this Act, shall include any product thereof that gives off an inflammable vapour at a temperature of less than 100 degrees Fahrenheit. By the Petroleum Act, 1868, s. 3, for the purposes of the Petroleum Acts, 1862 and 1868, "petroleum" shall include all such rock oil, Rangoon oil, Burmah oil, any product of them, and any oil made from petroleum, coal, schist, shale, peat, or other bituminous substance, as gives off an inflammable vapour at a temperature of less than 100 degrees Fahrenheit:—

Held, that all petroleum proper, whether giving off an inflammable vapour at under 100 degrees or not, was within the Acts; and that, therefore, the keeping of any petroleum proper, otherwise than for private use, within fifty yards of a dwelling or storehouse, without a licence, was prohibited by s. 4 of the Act of 1868.

CASE stated by Justices of Surrey, under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant, under the Petroleum Acts, 1862 and 1868 (2), charging

(1) See the next case.

(2) By the Petroleum Act, 1862 (25 & 26 Vict. c. 66), after reciting that it is expedient to provide for the safe keeping of petroleum and certain products thereof that are dangerous to life and property, from their properties of giving off inflammable vapours at low temperatures, it is enacted as follows:—

S. 1: "'Petroleum,' for the purposes of this Act, shall include any product thereof that gives off an inflammable vapour at a temperature of less than 100 degrees of Fahrenheit's thermometer."

S. 2: "Every vessel carrying a cargo consisting wholly or in part of petroleum on entering any harbour within the United Kingdom shall conform to such regulations in respect to the place at which she is to be moored as may from time to time be issued by the

1871

JONES v. COOK.

that the appellant did keep, otherwise than for private use, within fifty yards of a certain dwelling-house, then and there occupied by him, a quantity of petroleum, without being licensed in accordance with the said Acts.

Upon the hearing it was admitted by the appellant that he did keep such petroleum as charged in the information, and that he had no licence to keep it; and it was admitted by both parties that

---

harbour authority having jurisdiction over such harbour. If any vessel is moored in any place in contravention of such regulations, the owner or master of such vessel shall incur a penalty not exceeding 20*l.* for each day during which the vessel remains moored. . . ."

S. 3: "Not more than forty gallons of petroleum shall be kept within fifty yards of a dwelling-house, or of a building in which goods are stored, except in pursuance of a licence. . . ."

By the Petroleum Act, 1868 (31 & 32 Vict. c. 56), after reciting that it is expedient to make further provisions for the safe keeping of petroleum and other substances of like nature, it is enacted by s. 2 that the Act shall be read as one with the Act of 1862.

S. 3: "For the purposes of the Petroleum Acts, 1862 and 1868, including all local Acts and bylaws relating to petroleum or the produce thereof, 'petroleum' shall include all such rock oil, Rangoon oil, Burmah oil, any product of them, and any oil made from petroleum, coal, schist, shale, peat, or other bituminous substance, and any product of them, as gives off an inflammable vapour at a temperature of less than 100 degrees of Fahrenheit's thermometer."

S. 4: "The third section of the Petroleum Act, 1862, shall be repealed. . . . No petroleum shall be kept, otherwise than for private use, within fifty yards of a dwelling-house or of a building in which goods are stored, except in pursuance of a licence given in accordance with the Petroleum Act, 1862. There may be annexed to any such licence such conditions as to the mode of storage, as to the nature of the goods with which petroleum may be stored, as to the testing such petroleum from time to time, and generally as to the safe keeping of petroleum, as may seem expedient to the local authority. Any petroleum kept in contravention of this section shall be forfeited, and in addition thereto the occupier of the place in which such petroleum is kept shall be liable to a penalty not exceeding 20*l.* a day for each day during which petroleum is kept in contravention of the Petroleum Acts, 1862 and 1868, or either of such Acts."

S. 5: "No person shall sell or expose for sale for use within the United Kingdom, any description of petroleum which gives off an inflammable vapour at a temperature of less than 100 degrees of Fahrenheit's thermometer, unless the bottle or vessel containing such petroleum have attached thereto a label in legible characters stating as follows: 'Great care must be taken in bringing any light near to the contents of this vessel, as they give off an inflammable vapour at a temperature of less than 100 degrees of Fahrenheit's thermometer.' Any person acting in contravention of this section shall for each offence be subject to a penalty not exceeding 5*l.*"

S. 6 is given ante, p. 497, n (1).

the petroleum did not give off any inflammable vapour at a temperature of less than 100 degrees of Fahrenheit's thermometer, but that it did give off such a vapour at a greater temperature.

It was contended on the part of the appellant that, inasmuch as the petroleum in question did not give off an inflammable vapour at a temperature of less than 100 degrees, no licence was necessary, and that the definitions given of petroleum in s. 1 of the Act of 1862, and in s. 3 of the Act of 1868 shewed that the petroleum in question did not come within the provision of s. 4 of the Act of 1868.

It was contended on the part of the respondent that the term "petroleum" not only included the substances mentioned in s. 3 of the Act of 1868, as giving off an inflammable vapour at a temperature of less than 100 degrees of Fahrenheit's thermometer, but also included petroleum itself, or any product thereof in any form whatever; and that no test whatever was necessary with regard to keeping petroleum which was naturally a highly inflammable substance, although not always flashing at less than a temperature of 100 degrees Fahrenheit; and that any person who kept it must be licensed by reason of s. 4 of the Petroleum Act, 1868, and that, therefore, the keeping of petroleum without a licence, whether it flashed at less than 100 degrees of Fahrenheit's thermometer or not, was prohibited.

The justices being of opinion that the contention of the respondent was the correct construction of the Petroleum Acts of 1862 and 1868, and that the case was within the operation of s. 4, convicted the appellant in a penalty of 10*s*.

The questions for the opinion of the Court were, 1st, whether any kind of petroleum, at whatever temperature it gives off an inflammable vapour, is contemplated by s. 4 of the Act of 1868, and requires a licence for keeping it; 2ndly, whether only such petroleum as gives off an inflammable vapour at a temperature of less than 100 degrees of Fahrenheit's thermometer is contemplated by that section, and requires a licence for keeping it; 3rdly, whether the petroleum, for the keeping of which the information was laid against the appellant, was shewn to be within the provisions of the Petroleum Acts, 1862 and 1868; and whether the appellant was rightly convicted.

1871

JONES v. COOK.

Grantham, for the appellant. The conviction was wrong. Petroleum, by the definitions in s. 1 of the first Act, and s. 3 of the second Act, to be within the Acts must give off an inflammable vapour at under 100 degrees.

[BLACKBURN, J. Section 2 of the original Act is clearly against such a contention; it cannot be that the owner of a vessel laden with petroleum may disregard those regulations until it be ascertained whether the petroleum be inflammable within 100 degrees.]

The shipowner brings his vessel into harbour at his peril of its proving to be within the enactments.

[BLACKBURN, J. The same interpretation must be put on the definitions in these Acts as in any other Acts. The interpretation clauses say that petroleum shall include certain products of petroleum, and other things that give off inflammable vapour under 100 degrees; but it does not exclude petroleum. They do not say that petroleum shall include such petroleum and its products as give off this vapour.

MELLOR, J. The sections include other things beside petroleum, which are of a certain degree of inflammability, but they assume petroleum to be a dangerous thing, whether giving off an inflammable vapour at 100 degrees or not.]

Assuming s. 4 to extend to all petroleum, then s. 6 is inconsistent, which gives the inspector power to test all petroleum which shall be found kept, or offered, or exposed for sale; for there would be no necessity for inspecting if the keeping of all petroleum under s. 4 is made unlawful without a licence.

[MELLOR, J. Section 6 may possibly be confined to s. 5.]

If that had been intended, the word "kept," which is not in s. 5, would not have been inserted in s. 6.

[BLACKBURN, J. If the inspector inspects it and finds it to be petroleum he would not test it as far as s. 4 is concerned, but if he inspects it and finds it a product of petroleum, he must then test it.

MELLOR, J. As by the interpretation clauses petroleum is to include those products and oils, if inflammable at 100 degrees, it would be necessary to test the products and oils, although not petroleum itself, and therefore in giving the test for "petroleum," it may be that only such of the articles included in that term as

require testing are meant. And from s. 4 it is clear that petroleum is not to be kept without a licence.]

Lord, for the respondent. Section 6 is explained by s. 5, which makes it unlawful to sell, or expose for sale, any description of petroleum throwing off a vapour at under 100 degrees, without a warning label. Testing, therefore, would be necessary in this instance even for petroleum proper. Even under s. 4 petroleum proper may have to be tested if the licence requires it, as it may by the third paragraph of s. 4.

[MELLOR, J. Under s. 6 he is only to test petroleum "kept, exposed, or offered for sale."]

If that wording be correct, that would reconcile the difficulties of the Act.

Grantham, in reply. The words of s. 6 are "kept, *or* offered, or exposed for sale." "Kept" must refer to the "keeping" in s. 4. But, after all, it is doubtful on the statement of the case, whether this was "petroleum;" from the first question left for the Court, it would appear that it was only a "product of petroleum."

[BLACKBURN, J. It would not be worth the appellant's while to have the case sent back to ascertain this. We must assume it to be "petroleum," and not a "product of petroleum."]

BLACKBURN, J. Taking the intention of the legislature to be shewn by the words used in the Acts, I think that the magistrates were right, and that the conviction must be affirmed. There were two petroleum Acts passed; the one enacted, whereas it was necessary to provide for the safe keeping of petroleum, and certain products that are dangerous, that "petroleum shall include any product thereof that gives off an inflammable vapour at a temperature of less than 100 degrees." That means that petroleum shall mean petroleum, and also include that which might not otherwise be considered as petroleum, viz., products derived from petroleum, provided those products be of such a nature that they give off these inflammable vapours. Thus throughout the Act "petroleum" is to be used and considered as including such products as give off an inflammable vapour at a temperature of less than

1871

JONES v. COOK.

100 degrees. Then comes s. 3, which says that "Not more than forty gallons shall be kept within fifty yards of a dwelling-house, except in pursuance of a licence." That would mean that not more than forty gallons of petroleum, and of the products which give off that vapour, should be so kept. I think in all probability the legislature meant what they have expressed. For if a large quantity was brought in its natural state, and then stored, although it might not give off this vapour at the time it was stored, there was an extreme probability that during the time it was stored many changes might occur, so that it would give off that vapour and become mischievous. The legislature meant to say that petroleum shall not be stored except under a licence, and also that the products of petroleum shall not be stored if they be of such a nature as to give off these inflammable vapours at a low temperature. Then in the second Act, which is incorporated with the former one, a definition of petroleum is given by s. 3, for the purposes of the former Act and the present one, "petroleum shall include all such rock oil, Rangoon oil," and the other substances there mentioned, "as give off an inflammable vapour at a temperature of less than 100 degrees." There, again, petroleum is to be understood to mean not only petroleum, but all these oils which are there mentioned. It has been urged upon us that the legislature must have meant that petroleum should include only such petroleum as gives off these inflammable vapours at under 100 degrees, and that there is no apparent reason why petroleum should be worse off than rock oil. I do not know whether there is or is not any reason for that: I only say that the legislature has expressed such a distinction. They do say, such rock oil, Rangoon oil, and so on, as give off this inflammable vapour; they do not say such petroleum as gives off this inflammable vapour. We cannot say that it ought to be confined to such petroleum. If the legislature meant to say that petroleum only shall require a licence where it is such as to give off this vapour, they have not said so. Then in the enacting part (s. 4), instead of saying that not more than forty gallons shall be kept the legislature alter the enactment and say, "No petroleum shall be kept, otherwise than for private use, except in pursuance of a licence;" and if any petroleum is kept contrary to the section, the occupier of the place where it is kept shall be liable to a

penalty not exceeding 20*l.* a day. Here the legislature has used the word "petroleum," and they have said, "You shall not store up petroleum, nor store up such rock oil, and these other matters which give off this vapour at such a temperature." I think the object and intention of the legislature was that petroleum as imported in its natural state should not be stored without a licence. Then s. 5 says, "No person shall sell or expose for sale for use within the United Kingdom any description of petroleum" which gives off a vapour at the temperature mentioned, without a warning label; and there the legislature use express words, shewing what they meant. Selling, or exposing for sale, petroleum simply has not a penalty attached to it, but if it be such a description of petroleum as would give off a vapour at that temperature, then it shall not be sold, or if it be sold or exposed for sale without warning, there is a penalty of 5*l.* on the person so exposing it. The two sections clearly point out that the legislature was there intending to inflict a penalty on the person selling only very inflammable petroleum; but that the raw petroleum should not be stored in any quantity without a licence. If that was not intended the legislature can correct it. I rather think it was. The only doubt that arose in the course of the argument was upon s. 6, where it is provided that the inspector "may inspect and test all petroleum kept, or offered, or exposed for sale." It seems to me you may construe that enactment in this way. If the inspector finds that it is raw petroleum, he need not use the test, and the inspection is sufficient; if it be a product of petroleum, he has to make the test. I cannot find there anything which amounts to qualifying the express provision that raw petroleum, whether it sends off this vapour or not, shall not be stored without a licence. Section 8 gives the mode of testing petroleum: that means the testing such petroleum as requires a test. I have, therefore, come to the conclusion that the magistrates were quite right; that this petroleum, not being a product of petroleum, but petroleum proper, might not be kept and stored without a licence.

MELLOR, J. I am of the same opinion. The first Act provides for the safe keeping of petroleum and certain products thereof, as dangerous to life from their properties of giving off inflammable

1871

JONES v. COOK.

vapours at a low temperature. Section 1 says, "Petroleum for the purposes of this Act shall include any products thereof that give off an imflammable vapour at a temperature of less than 100 degrees." It is perfectly clear, both from authority and common sense, that when the legislature says petroleum shall include products of petroleum that give off inflammable vapours at a low temperature, they mean that petroleum within the provisions of the Act shall not only be petroleum proper, but dangerous products, though not pure natural petroleum. Then s. 3 forbids persons to keep in store more than forty gallons within fifty yards of a dwelling-house, except in pursuance of a licence given by the local authorities. If that Act stood alone, it is clear to me that it meant to say, when using the word "petroleum," no pure petroleum, nor any product of petroleum which gives off this inflammable vapour at a temperature of less than 100 degrees. A change is made in the second Act, very probably in consequence of some suggestion that there were certain other oils which do give off this vapour at that low temperature, and they therefore were as dangerous as petroleum or the products of petroleum; and the legislature made a provision which includes these oils, that is to say, "rock oil, Rangoon oil," and so on, which give off these vapours at 100 degrees of temperature; but still they leave untouched petroleum proper. The distinction is very important in ss. 4 and 5 between storing and keeping or exposing for sale. By s. 4 no petroleum shall be kept otherwise than for private use within fifty yards of a dwelling-house, except in pursuance of a licence; and certain conditions are to be imposed by the licence granted under this section as to the mode of storing, the nature of the goods it may be stored with, and the testing of it from time to time, and generally for the safe keeping of petroleum, as may seem expedient to the local authorities. Those are the provisions for storing; and then there is a penalty imposed on the occupier of the premises in which these inflammable compounds may be stored contrary to the conditions of the licence. Then s. 5 says, "No person shall expose for sale for use within the United Kingdom any description of petroleum" which gives off these inflammable vapours, unless the vessel containing such petroleum have a warning label attached thereto. The object of this

section is, under a penalty, to compel the person who exposes this inflammable matter for sale to warn the persons to whom he sells it of its dangerous nature. Then s. 6 says, it shall be lawful for the inspector of weights and measures at reasonable times to inspect "all petroleum kept, offered, or exposed for sale." That means something different from the petroleum referred to in s. 4. The test is to be applied to this petroleum, or the dangerous products kept, or offered, or exposed for sale. All this, I think, goes to shew that it was not intended to dispense with or alter the provisions in s. 4, but that it was an additional provision for the care of petroleum where it was kept for sale. It appears to me that the intention of the legislature is expressed by the words in the definition clauses; and, when you come to look at all the sections, and know the reasons for these particular provisions, that they no longer conflict, but are perfectly reconcileable with a very sensible intention on the part of the legislature that all petroleum should be subject to the Act. Upon these grounds I am of opinion that the magistrates were right, and that the conviction must be affirmed.

Conviction affirmed.

Attorneys for appellant: *Ashurst, Morris, & Co., for C. Walter, Kingston-upon-Thames.*

Attorneys for respondent: *Bell & Newman.*

END OF EASTER TERM, 1871.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

TRINITY TERM, XXXIV VICTORIA.

1871
May 3.

TOLLETT AND ANOTHER, APPELLANTS; THOMAS, RESPONDENT.

Vagrant Act (31 & 32 *Vict. c.* 52), *s.* 3—*Gaming—Instrument of Gaming—Game of Chance—Betting on Horse-race.*

15 CLD 381

By 31 & 32 Vict. c. 52, s. 3, any person, playing or betting in a public place with any table or instrument of gaming at any game of chance, is liable to be convicted as a rogue and vagabond.

The appellants were convicted under the above section, on evidence from which it appeared that they were the proprietors of a machine called a "pari mutuel." The machine had on it numbers, beside each of which were three holes, and behind these holes were figures, which, by a mechanical contrivance, were made to shift on the turning of a key, so that any number from 0 to 999 would be exhibited behind these holes. On the top of the machine was the word "total;" and beside it were holes in which could be exhibited in a similar manner figures shifting on the turn of the key. The appellants took this machine to a racecourse, and appropriated each of the numbers to designate a particular horse about to run a race. Any person who wished to bet on a particular horse deposited with the appellants half-a-crown, and received a ticket with the number appropriated to the horse; and the appellants, by a turn of the key, altered the figures, increasing the sum indicated alongside of that number by one; and the same turn of the key increased the figures beside "total" by one. When the race had been run the holders of tickets with the number of the winning horse had divided among them

the amount of all the half-crowns deposited, less 10 per cent., which the appellants retained as proprietors of the machine:—

Held, that the machine was an instrument of gaming within the statute; and that the appellants had been rightly convicted.

CASE stated by Justices for the borough of Wolverhampton under 20 & 21 Vict. c. 43.

The appellants were charged at the instance of the respondent, inspector of the borough police, under s. 3 of 31 & 32 Vict. c. 52, for that they on the 10th of August, 1870, did in a certain open and public place, to which the public had access, to wit, the Wolverhampton racecourse, unlawfully game with a certain article used as an instrument or means of wagering on gaming at a game of chance, contrary to the statute; and upon the hearing of such charge the appellants were convicted of the above offence, and adjudged to be rogues and vagabonds within the intent and meaning of 5 Geo. 4, c. 83, and were sentenced to seven days imprisonment with hard labour.

The following facts were either proved or admitted: — The respondent was on duty on the racecourse on the 10th of August, and saw the appellants about 100 yards from the grand stand; they were standing on stools, and the machine, which he seized and produced in court, called the "pari mutuel," was between them. They were both shouting, "Now, gentlemen, what will you back? Lay your money on." He saw them receive money, and give tickets similar to those he produced. The public had access to the racecourse. When a person paid a half-crown he had a ticket given him, and the machine was used as a means of registering the gross total of money received, and exhibiting such total to those persons who had been induced to bet on the race. Another witness corroborated the respondent, and added that the appellants were inviting the public to lay out their money, and he saw the appellants receive money and give tickets. The contingency for the deposit was the result of each race. It was also admitted by the appellants that they deducted a commission of 10 per cent. from the gross total of money received.

[The above was all that was stated in the case as to the machine; but on the argument of the case, the machine was produced in

1871

FOLLETT v. THOMAS.

court, and the use made of it explained: and this is fully set out in the judgment of the Court.]

On the part of the appellants it was contended that there had been no offence committed within the intent and meaning of s. 3 of 31 & 32 Vict. c. 52, inasmuch as the appellants had not been using an instrument of gaming as contemplated by the section. That the instrument must be one upon the action of which the whole issue of the bet entirely depended, and that there was no evidence to shew that the instrument used by the appellants was an instrument of that kind, inasmuch as the event to be determined did not in any way depend upon the instrument. That it was simply a betting-book upon a large scale, upon which were recorded the amounts staked upon each horse. It was further contended that no offence had been committed within the intent and meaning of the statute, inasmuch as s. 3 only applies to playing or betting by way of wagering on gaming by the person using the instrument, and that there was no evidence to shew that the appellants were playing or betting by way of wagering on gaming; and further that the facts adduced did not support the charge.

On the part of the respondent it was contended that the evidence would fully justify a conviction; and that the appellants by inviting the public to lay out their money and by their receiving money to be disposed of by them according to the result of the races, and the instrument being used as a means of registering the amount of money received, and also as an advertisement of the process of betting were essentially "playing with an instrument of gaming," within the intent and meaning of the section.

The justices were of opinion that the machine was an instrument to facilitate gaming, and was a means of wagering on gaming, within the meaning of s. 3 of 31 & 32 Vict. c. 52, and convicted the appellants as above stated.

The questions for the Court were, whether the appellants using the instrument called the "pari mutuel" on the Wolverhampton racecourse (which the justices held to be a public place within the meaning of the Act) in the manner stated was a means of playing

1871

TOLLETT v. THOMAS.

or wagering on gaming at a game of chance, and the commission of an offence against s. 3 of 31 & 32 Vict. c. 52. (1)

April 26. *Harris*, for the appellants, urged the above points, especially that the appellants were not themselves playing or betting.

[BLACKBURN, J. I take it that if they produce the instrument for others to play with, they would be using it within the meaning of the Act.]

He also argued that a horse-race was not a game of chance; and on this point relied on *Hirst* v. *Molesbury*. (2)

H. James, Q.C. (*Nasmith* with him), for the respondent. The appellants used this instrument as a means of betting at a game of chance. Each particular bet was made by them, although in the end they only received a percentage of the whole money. A horse-race is a game of chance.

[LUSH, J. The 8 & 9 Vict. c. 109, s. 18, talks of a subscription to a plate to be awarded to the winner of any lawful game, clearly referring to horse-racing. So *Thorpe* v. *Coleman* (3) shews that horse-racing was considered "a game" within 9 Anne, c. 14.

COCKBURN, C.J. The question here is, whether horse-racing is "a game of chance" within this statute.]

It is submitted that it is: the authorities shew it to be a "game;" and experience shews that there is nothing about which there is so much uncertainty as the event of a horse-race. But even conceding betting on the event of the race merely not to be betting on a game of chance, in the present instance there is an additional element of chance introduced; for although the winning of the bet depends on the event of the race—on which horse wins the race—yet the amount of the winnings by this machine

(1) 31 & 32 Vict. c. 52, s. 13: "Every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming at any game or pretended game of chance, shall be deemed a rogue and vagabond" within the intent of and punished under the provisions of 5 Geo. 4, c. 83.

(2) Ante, p. 130.

(3) 1 C. B. 990, 100.

1871

TOLLETT v. THOMAS.

depends on the number of persons who have backed that particular horse, and that is entirely a matter of chance.

Harris, in reply.

Cur. adv. vult.

May 23. The judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.), was delivered by

COCKBURN, C.J. This is a case stated for the opinion of this Court by two justices who had convicted the appellants under stat. 31 & 32 Vict. c. 52, s. 3, which enacts, that every person playing or betting in a public place, "at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering *on* gaming, at any game, or pretended game of chance," may be convicted and punished as a rogue and vagabond.

There seems no doubt that the word *on* in this statute is by a clerical error substituted for "or," and that the statute is to be read as if the word was "or."

The article which was actually used on this occasion is not sufficiently described in the case, but it was produced in court, and we had the opportunity of personal inspection. It was a machine having on it numbers, beside each of which were three holes, and behind these, again, figures, which, by a mechanical contrivance, were made to shift on the turning of a key, so that any number from 0 to 999 could be exhibited behind these holes. On the top of the machine was the word "total;" and beside it were holes in which could be exhibited in a similar manner figures shifting on the turn of the key.

The appellants took this machine to the racecourse, and there appropriated each of the numbers to designate a particular horse about to run in a race. Any person who wished to bet on a particular horse deposited with them half-a-crown, and received a ticket with the number appropriated to the horse selected by the better; and the appellants, by a turn of the key, altered the figures, increasing the sum indicated alongside of that number by one, and, as the machine was contrived, increasing by the same turn of the key, the sum indicated by the figures beside the word "total" by one. Thus if, at the beginning, when all the holes were filled up

by cyphers, the first half-crown was deposited in exchange for a ticket bearing the number "1," the twist of the key would change the figures exhibited beside number 1, from 000 to 001, and at the same time change the figures exhibited beside "total," so as there also to shew 1.

When the race was run, the holders of tickets which had on them the number appropriated to the winning horse were entitled to divide among them the amount of the total, less 10 per cent., which was to be retained by the appellants, the proprietors of the machine.

Thus, with ingenuity worthy to be employed in a better cause, it was contrived that each person, who was induced to bet, might see at a glance what was the amount of the odds offered if he bet on any particular horse; but (and this is material to be observed), the state of the odds was liable to be changed before the race was run.

To illustrate what is meant, let us suppose that at some particular time, the figures opposite "total" indicated that 99 half-crowns had been deposited, and the figures opposite No. 1 shewed that, for some reason or other, no ticket had been taken out for that horse. Any one, seeing and understanding this, would know that, if he deposited his half-crown and took a ticket for No. 1, thus swelling the total to 100, he would, if things remained unaltered till the race was run, and the horse designated by No. 1 won the race, as holder of his ticket, receive 90 half-crowns. But he would also know that the odds were liable to be altered: for example, if 100 persons subsequently deposited half-crowns, so as to swell the total to 200, and none took tickets for No. 1, he would, in the event of No. 1 winning, receive 180 half-crowns: but if 19 of those new depositors took tickets for No. 1, he would, in the event of No. 1 winning, only receive 9 half-crowns; for the total would have to be divided between the holders of No. 1 tickets, by the supposition now 20 in number. The person therefore who, by means of this machine, is induced to part with his half-crown, does so on a speculation, his chance of remuneration depending on two events: one, namely, whether his horse wins, determining whether he shall get back anything; the other, namely, how many other gamblers shall have deposited their half-crowns, and on what

1871

TOLLETT v. THOMAS.

tickets, determining how much he shall receive in the event of his winning. Over neither event could he by any skill or efforts of his own exercise any control.

There is no doubt that what was done was done in a public place. The question for our decision is whether the machine referred to in the case is an "instrument or means of wagering or gaming at a game of chance," within the meaning of the Act, 31 & 32 Vict. c. 52, s. 3. This again resolves itself into two questions: 1. Is the machine an instrument of wagering or gaming? 2. Is the game on which the wagering took place, under the circumstances stated, a game of chance?

On the first question, it was argued, that the instrument was not an instrument of wagering, inasmuch as the wagering took place quite independently of it, the use of the machine being confined to the registering of the bets made; and that a book or large sheet of paper might, though no doubt less conveniently, have been made available for the same purpose. This argument, though at first sight a specious one, will not in our opinion hold. The machine in question is a mechanical contrivance for enabling persons, willing to bet on the event of a race, to ascertain the state of the bets already made on the different horses about to run, and to calculate the chances of winning according as they may bet on any particular horse. There can be no doubt that it materially assists the parties resorting to it in the operation of betting, and we cannot doubt, therefore, that it is used as an instrument or means of betting. Whether some other contrivance might be resorted to which would not be "an instrument or means of wagering," within the statute, is a question we may have to decide hereafter, but with which we need not trouble ourselves now. It is enough to say that the instrument in question is intended to assist persons in wagering, and undoubtedly has that effect; this being enough, we think, to bring it within the words, as it certainly is within the mischief, of the statute.

The second question is whether the wagering thus carried on is wagering on a game of chance. It was urged upon us in the argument that the betting here being on the event of a horse-race, it could not be considered as wagering on a game of chance, a horse-race not properly coming within such a definition. It is

unnecessary to determine whether, if this instrument had been used simply for registration of bets on the event of a horse-race, the use of it would have been within the statute. Whether a horse-race be in itself a game of chance or not, we can entertain no doubt that, if some additional element of chance be introduced, the wagering on a horse-race may be converted into a game of chance. Thus, to use a familiar illustration, a lottery, in which each individual draws a particular horse, on the success of which the winning of the stakes depends, would, we cannot doubt, constitute as between the parties to such a lottery a game of chance.

In the present instance, an element of chance is introduced, which, though not having any reference to the main event—namely, the result of the race in the winning of a particular horse—is yet essential to making the wager laid upon the winning horse profitable to the better. The winning of the horse betted upon is of course the primary condition of the wager being won; but whether the winning of the wager shall be productive of any profit to the winner, and more especially what the amount of that profit shall be, depends on the state of the betting with reference to the number of bets laid on or against the winning horse—a state of things fluctuating from one minute to another throughout the duration of the betting. Now this being something wholly independent of the issue of the race, as well as of the will and judgment of the winner, depending, as it does, on the will or caprice of the other persons betting, is a matter obviously of uncertainty and chance to the individual better, more especially in the earlier stages of the betting. There being, then, this element of chance in the transaction among the parties betting, we think it may properly be termed, as amongst them, a game of chance.

We quite agree that, though the case is obviously within the mischief contemplated by the statute, we ought not unduly to strain the words of the statute in order to bring the case within it. But, as here chance has, as has been explained, a material influence in determining the result of the betting as a source of gain, it appears to us that we may properly hold the wagering in question to have been wagering on a game of chance.

That being so, as there can be no doubt that the racecourse, on which the betting was carried on, was a public place within the

1871

TOLLETT v. THOMAS.

meaning of the statute, we are of opinion that the conviction was right, and must be affirmed.

Judgment for the respondent.

Attorneys for appellants: *Austen, De Gex, & Harding.*
Attorney for respondent: *Cattell.*

June 15.

[IN THE EXCHEQUER CHAMBER.]

GRAY *v.* CARR AND ANOTHER.

Ship and Shipping—Lien of Shipowner under Charterparty and Bill of Lading, for Dead Freight and Demurrage, and Detention at Port of Lading, as against Assignee of Bill of Lading.

The plaintiff, on the 18th of August, 1866, chartered his vessel *Superior* to R. C., for a voyage from Sulina to London. By the charterparty the ship was to proceed to Sulina, and there load a full cargo of staves $\frac{\text{and}}{\text{or}}$ grain, or other lawful merchandise, which the charterer bound himself to ship, and thence proceed to London, and deliver the same on being paid freight at 8*s.* per 100 oak staves, and other merchandise, if shipped, in fair proportion; fifty running days to be allowed for loading and ten days on demurrage over and above the said laying days at 8*l.* per day. The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibility to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge.

The ship arrived at Sulina, and after considerable delay the loading, as far as it went, was completed on the 5th of January, 1867; and on that day bills of lading were signed by the captain, under protest: "Shipped by R. C. on the ship *Superior*, of whom H. W. is captain, now lying in the port of Sulina, and bound to consign his cargo as per charterparty of 18th of August, 1866, 283,682 oak staves, which are to be delivered at the port of discharge, as per the aforesaid charterparty . . . unto order, or to his or their assigns, he or they paying freight *and all other conditions* or demurrage (if any should be incurred) for the said goods, as per the aforesaid charterparty. (The words "and all other conditions" were added in writing.)

A full and complete cargo was not shipped, and the vessel sailed from Sulina, and performed her voyage with a short cargo. She was also detained at her port of loading during the ten days on demurrage, and also eighteen days beyond the ten days. The cargo was of value sufficient to cover the plaintiff's claims for freight, dead freight, and demurrage.

On the ship's arrival in London, the plaintiff claimed a lien on the cargo for the amount of dead freight, and of demurrage, and for damages for her detention during the eighteen days.

The defendants claimed the cargo as the consignees named in the bills of lading;

they had no notice until the arrival of the ship in London of the said claim, but a copy of the charterparty had been sent to the defendants with the original bill of lading.

The Court of Queen's Bench held, on the authority of decided cases, that the plaintiff had a right of lien as against the defendants for the ten days demurrage; but not for dead freight, nor for the damages for detention during the eighteen days.

On error by both parties:—

Held, by Kelly, C.B., Willes and Brett, JJ., and Channell, B., that there was no lien given for damages for short loading under the term "dead freight" in the charterparty.

By Bramwell, B. [on the authority of *McLean* v. *Fleming* (Law Rep. 2 H. L. Sc. 128)], and Cleasby, B., that such a lien was given by the charterparty.

Held, also, by Kelly, C.B., Bramwell, Channell, and Cleasby, BB., that a lien was given by the charterparty for demurrage proper under the term "demurrage," but not for damages for detention beyond the demurrage days; and that this lien for demurrage at the port of loading was retained by the terms of the bill of lading:

By Willes and Brett, JJ., that, if a lien was given by the charterparty for demurrage and detention at the port of loading, it was not retained against the defendants by the terms of the bill of lading.

The whole Court of Exchequer Chamber were therefore agreed that the judgment of the Queen's Bench for the defendants as to the damages for the detention was right; and the judgment of the Queen's Bench was affirmed on the other two points by a majority of four judges against two.

ERROR from the judgment of the Court of Queen's Bench, on a special case stated without pleadings.

1. The plaintiff is the owner of the ship *Superior*, the defendants are merchants in London, and the consignees of certain timber shipped on board that ship.

2. On the 18th of August, 1866, the plaintiff entered into a charterparty with R. Carnegie, of which the following are the material parts:—

It is this day mutually agreed between N. Gray, managing owner of the ship *Superior*, of the measurement of 689 tons or thereabouts, now at Alexandria, Henry Whitehead commander, and R. Carnegie, of London, merchant, that the said ship being tight, staunch, &c., shall with all convenient speed proceed to Sulina, or so near thereunto as she may safely get, and there load as customary from the factors of the said freighter a full and complete cargo of staves and/or grain, seed or stowage goods or lawful merchandise, which the said merchant binds himself to ship, not exceeding what she can reasonably stow; and, being so loaded,

1871

GRAY v. CARR.

shall therewith proceed to London, and deliver the same on being paid freight as follows, viz., 8s. per 100 pieces of oak staves 34/36 in. × 4½, 16 in. × 11/14 lines, all French measure; other dimensions in proportion, and other merchandise if shipped to pay in full and fair proportion (1) . . . The cargo to be brought to and taken from alongside at charterer's expense and risk, the ship's boats and crew to render all customary assistance in towing the lighters, &c. . . The freight to be paid in cash on unloading and right delivery of the cargo; fifty running days, not to count before 15th of October, if required by merchants' agents, are to be allowed the said merchant (if the ship is not sooner despatched) for loading, and to be discharged as fast as ship can put the cargo out, and ten days on demurrage over and above the said laying days at 8*l.* per day; detention by frost not to be reckoned as lay days. The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibilities to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge; should any portion of the cargo be delivered in a heated or damaged condition the freight shall be computed in the usual manner on the bill of lading quantity, or half freight paid on the heated or damaged portion at captain's option, provided no part of the cargo be thrown overboard or otherwise disposed of on the voyage. Cash for ship's use at port of loading, not exceeding 200*l.*, to be advanced the master free of interest and commission, and deducted from the freight with insurance . . .

3. The ship arrived at Sulina on the 14th of October, 1866, and on the 19th of October, 1866, the captain gave notice to Mr. Theophilatus, the charterer's agent at Sulina, that the ship was then ready to receive cargo, and that the lay days were to commence from the 20th of October, 1866.

4. Although the master repeatedly inquired of Theophilatus after the cargo between the 20th of October and the 1st of December, 1866, and required him to load the ship in conformity

(1) The charterparty was a printed form; the above are the clauses as they stood altered in writing. The Court had the original before them; and the clauses as to cargo and freight, as they had stood in print, are given in Cleasby, B.'s, judgment, post, p. 529.

with the charterparty, no cargo was supplied to the ship till the 1st of December, 1866, on which day a number of staves were sent in lighters alongside the ship. The stowing of these staves was at once commenced, and it went on till the 5th of January, 1867, but no cargo was shipped on the ship until the 3rd of December.

5. On the 8th of December, 1866, the master made a protest before the vice-consul at Sulina, declaring, as the fact was, that neither the merchant nor his agent had completed the loading of the ship, notwithstanding the expiry of the lay days on that day, and that the vessel would from that day lie on demurrage on the terms of the charterparty. A copy of this protest was sent to Theophilatus.

6. On the 26th of December, 1866, Theophilatus sent a letter to the master to the effect following: "As your ship is down to the water allowed to cross the bar with, and in consequence you have stopped the work this morning to load the remainder of the cargo in the roads, I beg to notify to you that as customary your ship's time ceases counting henceforward."

7. The plaintiff contends that it was not customary that a ship's time should cease counting under the circumstances mentioned in the 6th paragraph, but the defendants dispute this contention; and should this circumstance be in the judgment of the Court material to the case, it is to be determined by the arbitrator as hereinafter mentioned.

8. On the 26th of December the ship crossed the bar into the roads, and the loading was there continued till the 5th of January, 1867, on which day the loading and stowing of such cargo as was furnished by the merchant was completed.

9. On the said 5th of January the master signed, under protest (but of which protest the defendants had no notice before the commencement of this action) a set of four bills of lading as follows:—

Shipped in good order and condition by Theologos and Carnegie, in and upon the good ship called the *Superior*, under English flag, whereof is master for this present voyage Henry Whitehead, and now lying in the port of Sulina, and bound to consign his cargo as per charterparty, dated London, the 18th of August, 1866, 283,682 oak staves, which are to be delivered in the like good order and condition at the port of discharge as per the aforesaid charter-

1871

GRAY v. CARR.

party . . . unto order, or to his or their assigns, he or they paying freight *and all other conditions* (1) or demurrage (if any should be incurred) for the said goods as per the aforesaid charterparty. . .

10. It is to be assumed, for the purposes of this case, that the merchant did not ship a full and complete cargo, and that the ship sailed from Sulina and performed her voyage with a short cargo. The plaintiff claims 364*l.* 19*s.* 5*d.*, as dead freight, for the cargo thus short shipped.

11. The vessel was also detained at her port of loading during the whole of the ten days on demurrage, which, at 8*l.* per day, amounted to 80*l.*, and also eighteen days beyond the said ten days. What would be a fair amount of compensation for such detention is still a matter in dispute between the parties, to be referred, in case of necessity, to arbitration as agreed between the parties.

12. The ship arrived in London on the 23rd of March, 1867, and at once commenced unloading.

13. The cargo was of value sufficient to cover the plaintiff's said claims for freight, dead freight, and demurrage.

14. The defendants were the consignees named in the bills of lading, and the property in the goods was vested in the defendants upon and by virtue of such consignment. The defendants had no notice until the arrival of the ship in London of the said claims of the plaintiff; but a copy of the charterparty had been sent to the defendants with the original bill of lading.

15. The plaintiff claimed a lien on the goods for the amount of his claims for dead freight and demurrage, and ultimately delivered the goods to the defendants upon the terms that such delivery should not prejudice the plaintiff's claim, if any, to a lien upon the goods for such amounts.

The question for the opinion of the Court was, whether the plaintiff had a lien upon the cargo as against the defendants for the said amounts, or any, and which of them.

On the 26th of January, 1870, the Court of Queen's Bench, on the authority of decided cases, without argument, gave judgment for the plaintiff for 80*l.* for demurrage and for the defendants as to the dead freight and damages for detention beyond the days

(1) The words in italics were inserted in writing, the bill of lading being on a printed form.

allowed for demurrage. Upon which the plaintiff brought error on the ground that he was entitled to judgment on all three claims; and the defendants also alleged error on the ground that they were entitled to judgment as to the demurrage also.

Nov. 29. 1870. *Watkin Williams* (*A. L. Smith* with him), for the plaintiff.

Feb. 1, 1871. *Sir G. Honyman, Q.C.* (*Lanyon* with him), for the defendants.

A. L. Smith was heard in reply.

The arguments are fully noticed in the judgments of the Court.

In addition to the cases noticed in the judgments, the following cases were cited: *Oglesby* v. *Yglesias* (1); *Milvain* v. *Perez* (2); *Pedersen* v. *Ledinga* (3); *The Norway* (4); *Russell* v. *Niemann*. (5)

Cur. adv. vult.

June 15. The following judgments were delivered:—

CLEASBY, B. In this case the defendants were the holders of a bill of lading of the cargo of the ship *Superior*, of which the plaintiff was owner. The vessel had been chartered on a voyage from Sulina to London. Upon the arrival of the ship at the port of discharge the plaintiff claimed a lien upon the cargo for ten days demurrage, for a proper allowance for a further period of detention, and for dead freight. The Court of Queen's Bench held the plaintiff entitled to the claim for demurrage, but disallowed the claim for dead freight and for detention. Error has been brought in this Court, and the case has been fully argued.

I am of opinion that the judgment of the Queen's Bench should be affirmed, so far as relates to the demurrage allowed and the claim for detention disallowed. But it appears to me that the plaintiff is also entitled to the claim for dead freight.

The charterparty is between Gray, the managing owner, and R. Carnegie, of London, charterer, and contains a clause which is

(1) E. B. & E. 930; 27 L. J. (Q.B.) 356.
(2) 3 E. & E. 495; 30 L. J. (Q.B.) 90.
(3) 28 L. T. 267.
(4) Bro. & Lush. 226.
(5) 17 C. B. (N.S.) 163; 34 L. J. (C.P.) 10.

(2) 5 C. P. Jur. N.S. 337

1871

GRAY v. CARR.

now not unusual, viz., that the charterer's responsibilities were to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at the port of discharge; and gives the owner an absolute lien on the cargo for all freight, dead freight, demurrage, and average. The first question to be considered is, to what extent could the lien be enforced as between the parties to the charterparty. The charterparty allows fifty running days for loading the cargo, which is to be discharged as fast as the ship can put the cargo out, and ten days are to be allowed on demurrage, over and above the laying days, at 8*l.* per day. Now the word "demurrage" has a known legal meaning, viz., the additional period during which the vessel may remain by agreement of the parties. It was said upon the argument that by the understanding of shipowners and charterers it had a more extensive signification, and embraced the further period beyond the demurrage days during which the vessel was detained. If that be so, evidence that in such a document as a charterparty the word was so usually understood should have been given, and the opinion of the jury taken; but in the absence of all evidence we must give to the word "demurrage" its known legal meaning, and this excludes from the operation of the lien the claim for damages caused by further detention.

As regards the claim for lien in respect of demurrage, I do not see how there can be any doubt about its existing under the charterparty. It appears clear to me that whether the demurrage days are occupied in the loading of the ship or in the discharge of it, the charterer is equally discharged from personal liability as soon as a sufficient cargo is loaded, and that the claim of the owner in respect of it exists only by virtue of the lien which is given by agreement. This is in conformity with the judgment of the Common Pleas in the case of *Bannister* v. *Breslauer*. (1)

As regards the lien for dead freight, I can see no sufficient reason why it should not be conferred by the charterparty. Dead freight is an expression having a well-known signification, viz., the freight which would have been payable for that part of the vessel which has not been occupied by merchandise, but ought to have been. I understand the objection to the lien existing in this case to be, that

(1) Law Rep. 2 C. P. 497.

under this charter the claim for dead freight must be a claim for unliquidated damages, and that the expression has found its way into this charter from others where the claim would be for liquidated damages; and that as applied to a claim for unliquidated damages there would be such delay in the delivery of the goods, and such inconvenience in enforcing it, that it must be regarded as applying only to a charter where the claim for dead freight would be in the nature of a debt. This appears to have been the view taken of the subject by the Court of Common Pleas, in the case of *Pearson* v. *Goschen*. (1) It was there said that the words "dead freight" were part of a printed form, and ought to be rejected from such a contract as the present one. But the reason given does not apply to the present case. Upon looking at the printed parts of the charter the words which give the lien for dead freight are in print, but so are the words which make the claim for dead freight a claim for unliquidated damages. The printed part provides for the charterer's loading a full cargo of grain, seed, or other stowage goods, and the freight is to be paid at so much per quarter of corn, and for other grain, seed, or stowage goods in proportion, according to the Baltic printed rates; so that one cargo might be more profitable to some extent than another, and the calculation of damages for dead freight would be complicated by that consideration. In the charter as it stands altered in writing the calculation would be simple. It obliges the charterer to load a full cargo, and makes the freight payable at so much per 100 pieces of oak staves and other cargo in fair proportion. It does not make the freight payable in respect of different cargo according to different specified rates, so as to make the freight to be earned vary with the cargo carried. But whatever be the cargo carried it would be paid at the same rate as if all had been oak staves. So that although the claim in form would be as damages for not loading a complete cargo, yet as soon as the capacity of the vessel for carrying oak staves is ascertained, the claim is liquidated by deducting the freight actually carried. The shipowner could at once make his claim for the known capacity of the ship, and he would do so at his peril if he claimed too much, and refused to deliver; and any two captains in the docks could settle the amount.

(1) 17 C. B. (N.S.) 352; 33 L. J. (C.P.) 265.

1871

GRAY v. CARR.

If there was a serious dispute the cargo would be delivered either upon a deposit of a sum of money at a bankers or upon security by bond. The lien for a general average involves much greater difficulties. It appears to have always existed independent of contract, both by the civil law and our law: Abbott on Shipping, p. 247, 5th ed.; and by the American law (which does not lightly esteem convenience), the captain may detain the goods until a bond to pay the sum contributable is paid, or even until the amount is paid: Kent's Commentaries, vol. iii., p. 339, 10th ed. It is expressly contracted for in the present case. Now we know how many weeks or months the adjustment of a general average claim may take, and what questions arise as to the proper item for allowance, and yet, practically, it never interferes with the delivery of the cargo, proper security being given as a matter of course to pay what in the result is found to be due.

The rule contended for by the defendants, and which is to some extent sanctioned by *Pearson* v. *Goschen* (1), would come to this: that the only case in which there is a lien for dead freight is where the claim is not for dead freight at all. If there is an agreement to pay so much a ton upon the carrying capacity of the ship, it matters not whether the ship is full or empty, the same sum is to be paid by the agreement, and there is nothing like dead freight in the transaction; yet it is said that the clause for dead freight was intended to apply, and can only apply to such a charter-party. But if the agreement is to load a full cargo, and to pay so much a ton for the cargo delivered, then if a short cargo is loaded there is a claim for dead freight, in other words, the freight does not exist, or is dead, which would have existed if the cargo had been loaded; and in this, which is the only real case of dead freight, the agreed lien for dead freight is said not to be applicable, and in that way the agreement of the parties is set aside.

As regards authority, the judgments of all the judges in the case of *Birley* v. *Gladstone* (2) may be regarded as almost in point in favour of the view above taken. In that case the freighter engaged to ship a full cargo, and was to pay 2*l.* 5*s.* per ton for salt on the voyage out, and 12*l.* per ton of flax and hemp, and 8*l.* per ton for

(1) 17 C. B. (N.S.) 352; 33 L. J. (C.P.) 265. (2) 3 M. & S. 205.

10 Jur N.S. 903

1871

GRAY v. CARR.

tallow, on the voyage home. There was a claim for dead freight, 372*l.* 12*s.*, in respect of space unoccupied. The question argued was, whether the general clause in the charterparty, by which the shipowner bound the ship and tackle, and the freighter bound the cargo, under a penalty for the due performance of all the covenants, amounted to a contract that the shipowner should have a lien for dead freight. It was held that it did not; and the ground of decision was that this clause was intended to give mutual remedies, and as it could not operate to give the freighter a lien, so it was not intended to give the shipowner a lien. But it was never suggested that if there was a contract for a lien in respect of dead freight, it would not apply to such dead freight as the present because it was unliquidated. The case of *Phillips* v. *Rodie* (1) is in entire conformity with this decision. I think it will appear that one of the learned judges who decided the case of *Pearson* v. *Goschen* (2) was under an erroneous impression as to the effect of the above two cases, though the error was corrected by the other learned judge, Mr. Justice Willes.

In reality the inconvenience seems to be rather one suggested in the interpretation of the contract than felt by the merchant in acting upon it. I do not think we can upon the ground of inconvenience set aside a contract giving a certain security for dead freight, which must mean the dead freight accruing under the same contract. To do so would be rather adopting that construction which has been much condemned, and which the doctors called "interpretatio viperina," because it destroyed the text.

If the construction of the charterparty which I have arrived at is the proper one, the remaining question is, whether on the bill of lading the right of lien for the demurrage and dead freight is retained as against the holders of that document. Upon the particular words used in this, as in similar documents, such as policies of insurance, there is abundant room for ingenious argument, both as regards the printed part, "he or they paying freight or demurrage, if any should be incurred," and upon the written addition, "and other conditions," coming in so awkwardly as it does between the words "freight" and "demurrage." But, taking it all to-

(1) 15 East, 547.

(2) 17 C. B. (N.S.) 352; 33 L. J. (C.P.) 265.

1871

GRAY v. CARR.

gether, the effect of it seems to me to be clear enough: when given to the charterer it was intended to retain the whole right of lien; and the fair meaning of the words is to do so.

It was contended by the defendants that the words, "if any should be incurred," shewed that the demurrage previously incurred could not be intended. But these words are part of the usual form, and are in general really superfluous, because demurrage cannot be payable unless it has been incurred. It would be unwarrantable to make the effect of such an instrument depend upon the retaining of words generally inoperative. And on the other side, it may be said that the word "demurrage" in the bill of lading must refer to demurrage at the port of lading, because, according to the language of the charterparty, none could be contemplated at the port of discharge. And it may be observed that although the words are generally inoperative as regards the right to demurrage, yet they prevent the bill of lading from containing an admission that demurrage is due; and this would be a good reason for retaining them in the present case, because by the charterparty days of frost are not to be included in the loading days; and it might not be known or agreed how much of the delay was from that cause. It appears to me, however, sufficient to say that the language in the present bill of lading includes all the conditions in the charterparty upon the performance of which the cargo is to be delivered, viz., payment of freight, demurrage, dead freight, and average.

This construction is in conformity with the authorities which have been decided upon the effect of the word "conditions" in such a document. In *Wegener* v. *Smith* (1) the words of the bill of lading were, "and other conditions, as per charterparty," and the Court of Common Pleas held that the word "conditions" made demurrage due under the charterparty payable upon delivery. And this decision was entirely approved of by the Court of Queen's Bench, in *Smith* v. *Sieveking* (2), though in that case, the only words being "paying for the goods as per charterparty," the Court held the fair meaning of those words was payment of freight at the rate in charterparty. Error was brought into the Exchequer

(1) 15 C. B. 285; 24 L. J. (C.P.) 25.
(2) 4 E. & B. 945; 24 L. J. (Q.B.) 257.

Chamber (1), and the case was considered too clear for argument. A remark was made referring to the demurrage incurred before the signing of the bill of lading not being covered by the language, but this was not the ground of decision, which Parke, B., stated to be, that the words "paying for the goods" meant payment for the carriage of the goods. There is no authority giving a different meaning to the word "conditions," and it is the only rational meaning of the word, coupled as it is with "freight and demurrage," and thus signifying those payments provided for by the charter to be made on delivery, or as a condition for delivery. It must be taken by the reference in the bill of lading to the charterparty that the defendant had notice of the contents of the charterparty, it indeed was admitted upon the case that he had received a copy of it, so that he knew all the conditions upon which the cargo was deliverable.

I am therefore of opinion that the Queen's Bench were right in giving the plaintiff the demurrage, that they were right in withholding the damages for the detention, but that they would have been right in giving the dead freight, and that their judgment must be corrected to that extent.

I will only add, that from what we were told took place upon the argument of this case in the court below, there is no reason for supposing that the Court of Queen's Bench would not have given the dead freight if they had not felt bound by the decision in *Pearson* v. *Goschen*. (2)

I am informed that in such a case as the present the House of Lords has decided very lately that the lien for dead freight applies. Some of my learned Brothers have seen a note of the case, and will refer to the name and particulars of it. If there was any authorized report of the case I should, of course, have referred to it and corrected my judgment by it, if necessary; so far as I can collect no correction would have been necessary. (3)

BRETT, J. This is a special case stated in an action in which the plaintiff sued the defendants for dead freight and demurrage.

(1) 5 E. & B. 589.
(2) 17 C. B. (N.S.) 352; 33 L. J. (C.P.) 265.
(3) See *McLean* v. *Fleming*, since reported, Law Rep. 2 H. L., Sc. 128; and see the note at the end of this case.

1871

GRAY v. CARR.

The plaintiff was the owner of a ship called the *Superior*. The defendants were merchants in London, and consignees of certain timber shipped on board the ship. The plaintiff had chartered the ship to one Carnegie. By the charterparty the ship was with all convenient speed to sail and proceed to Sulina, and there load from the factors of the freighter a full and complete cargo of staves $\frac{\text{and}}{\text{or}}$ grain, seed, or stowage goods, or lawful merchandise, which the merchant bound himself to ship, and being so loaded should therewith proceed to London, and deliver the same on being paid freight (according to certain specified rates). The freight to be paid in cash on unloading and right delivery of the cargo—fifty running days, not to count before 15th October, if required by merchants' agents, are to be allowed, if the ship is not sooner despatched, for loading; and to be discharged as fast as ship can put the cargo out; and ten days on demurrage over and above the said laying days at 8*l.* per day; the owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibilities to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge. The ship proceeded to Sulina, and loaded a short cargo. The cargo was shipped by the charterer's agents. A bill of lading was signed by the captain for 283,682 staves to be delivered at the port of discharge as per charterparty, unto order or assigns, he or they paying freight, and all other conditions, or demurrage, if any should be incurred, for the said goods as per charterparty. The claim for cargo short shipped (claimed as dead freight) was 364*l.* 19*s.* 5*d.* The claim for demurrage in respect of the ship being detained ten days on demurrage proper at the port of loading, was 80*l.* And there was a further claim of reasonable damages for eighteen days detention at the port of loading beyond the ten demurrage days. The defendants were the consignees of the goods named in the bill of lading, and the property in the goods vested in them upon and by virtue of the consignment. The plaintiff claimed a lien on the goods mentioned in the bill of lading for the dead freight and demurrage, and damages in nature of demurrage, which he alleged to be due.

It was argued on behalf of the plaintiff that he would have had by virtue of the charterparty a lien on the goods shipped

for the dead freight, demurrage, and damages, if the cargo had not been of sufficient value to cover freight and charges, &c.; but as the cargo was of sufficient value, the charterer's responsibility under the charterparty had ceased; and that consequently the bill of lading ought to be construed more favourably for the shipowner, and that the plaintiff had a lien on the goods to be delivered according to the bill of lading, because the bill of lading by reference imposed upon the goods to be delivered under it at the port of discharge the lien from which the charterer was relieved under the charterparty, and authorized the plaintiff to exercise that lien in respect of what had occurred at the port of loading against the defendants, the holders at the port of discharge of the bill of lading, and the owners of the goods mentioned in it.

It was contended on behalf of the defendants that the printed words in the charterparty, which were supposed to give a lien for dead freight, had no effect, because no charge for dead freight was stipulated for in the charterparty; that the non-responsibility of the charterers was applicable only to defaults which might occur after the sailing of the ship from the port of loading; that the bill of lading incorporated only such stipulations of the charterparty as were applicable to the goods mentioned in it, and which might take effect in respect of those goods only; and that the claims of the plaintiff in the present action, even though they come within the terms of the charterparty, were not such claims as were imposed on the defendants by the bill of lading.

These arguments raise two questions, namely, first, what is the right construction of the charterparty; and, secondly, what is the right construction of the bill of lading?

As to the charterparty, I am of opinion, in the first place, that it gave no lien to the shipowner for dead freight. It seems to me that a charterparty which leaves damages to be recovered in respect of short loading unspecified, and therefore at large, gives no claim for dead freight properly so called. Such a claim for unliquidated damages is not dead freight: per Williams and Willes, JJ., in *Pearson* v. *Goschen* (1); and, as I have always understood, was intended by Lord Ellenborough in *Phillips* v. *Rodie* (2). I always thought that that great judge was pointing out

(1) 17 C. B. (N.S.) 352; 33 L. J. (C.P.) 265. (2) 15 East, at p. 555.

1871

GRAY v. CARE.

that, although many people called unascertained damages for not loading a full cargo dead freight, they were wrong. And inasmuch as the charterparty gives an express lien in terms for dead freight only, it is not to be construed as giving it for unliquidated damages for not loading a full and complete cargo. Speaking of a similar claim in respect of pre-paid freight, which was not freight in its ordinary sense, Lord Kingsdown laid it down that "where parties, instead of trusting to the general rule of law with respect to freight, have made a special contract for themselves for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist; and that when the contract made gives no lien, the law will not supply one by implication:" *Kirchner* v. *Venus*. (1) And the application of this doctrine to the present case is not affected by the printed clause, which would, if there had been any dead freight stipulated for by the charterparty, have given an absolute lien for it: *Pearson* v. *Goschen* (2). That case seems to me, if I may be allowed to say so, rightly, and according to the true mode in which the courts ought to deal with mercantile business, to point out a necessary and timely modification of the older rule of construction as to giving, if possible, a meaning to every term in the contract, in cases where a modern mercantile instrument is known to be in a printed and general form, with parts of it to be filled up in writing to apply it to particular transactions.

As to the second point argued with regard to the charterparty, namely, that the liability of the charterer, in respect of damages for short loading, and for demurrage, and damages for detaining the ship at the port of loading beyond the demurrage days, ceased on the loading on board the ship of a cargo of sufficient value, and that as a consequence the bill of lading ought to be construed in favour of the shipowner, so as to throw the burden of the lien on the consignee under the bill of lading at the port of discharge. I cannot agree that the second proposition could properly be affirmed, merely because the first were made good. But further, I do not think that the first proposition is sound. With all respect for the judges who decided *Bannister* v. *Breslauer* (3), I think

(1) 12 Moo. P. C. at p. 398.

(2) 17 C. B. (N.S.) 352; 32 L. J. (C.P.) 265. (3) Law Rep. 2 C. P. 497.

1871

GRAY v. CARR.

that their interpretation of the charterparty was too severe. The case was decided on demurrer. The judges relied much on the lien given in respect of demurrage, which they assumed was for delay at the port of loading. But if by other terms of the charterparty than those which were before the court, demurrage was stipulated for in respect of delay in unloading at the port of discharge, the chief ground on which they based their interpretation would be cut away. I cannot but think that the safer and juster and more correct construction of the clause then and now under discussion is, that it absolves the charterer, when once cargo of sufficient value is on board, from all liabilities, which, but for it, he might incur in respect of anything happening after the sailing of the ship, or, more properly speaking, after the bill of lading is given, as it were, to replace the charterparty.

The next question is, what is the true construction of the bill of lading? Even if the charterparty does give to the shipowner the alleged lien with regard to the alleged dead freight, the demurrage, and damages in nature of demurrage, is such lien imposed upon the goods mentioned in the bill of lading as against the defendants, the owners of such goods, and consignees of them under the bill of lading? The answer, as it seems to me, depends entirely on the construction to be put on the terms of the bill of lading. Upon that construction alone depends the question whether there is any evidence from which a contract between the plaintiff and the defendants to the effect contended for by the plaintiff can be implied. The rule or canon of construction is to be deduced from the cases which have been cited. In *Smith* v. *Sieveking* (1), the action was brought against the consignee at the port of discharge under the bill of lading for demurrage incurred at the port of loading. By the terms of the bill of lading, which was for the whole cargo, the goods were to be delivered in London to order, &c., he or they paying for the said goods as per charterparty. By the charterparty an ascertained sum of 5*l.* per day was stipulated for as demurrage for delay at the ports of loading and discharge; and it was agreed and understood that for the payment of all freight and demurrage the captain should have an absolute lien and charge on the cargo.

(1) 4 E. & B. 945; 24 L. J. (Q.B.) 257.

1871

GRAY v. CARR.

The Court of Queen's Bench decided in favour of the defendants (1). And Parke, B., in affirming that decision in the Court of Error (2), said: "In this case you must contend that the consignee at the port of discharge contracted to pay for the antecedent delay of the charterer, which occurred at the port of loading before the consignee had anything to do with either goods or ship. *Such a contract is one which requires strong evidence to support it; for it is, to say the least, not a reasonable one.*"

In *Chappel* v. *Comfort* (3) the action was against the indorsees of the bill of lading for demurrage at the port of discharge. By the charterparty sixteen lay days were allowed for loading and unloading, and there was demurrage at 2*l.* per day for any detention beyond that time. By the bill of lading the goods were deliverable to order, "paying freight as per charterparty;" and there was a memorandum written in the margin, "there are eight working days for unloading in London." Upon this memorandum the claim was founded. The Court gave judgment for the defendants, Willes, J. says, "It may be, and it often does happen, that the person who receives the goods intends to pay all the charges mentioned in the charterparty. *But when it is intended that such an obligation should be imposed on him, it should be done in plain words,* as was done in *Wegener* v. *Smith* (4), and other cases, where by the terms of the bill of lading the goods were made deliverable to order 'against payment of the agreed freight and other conditions as per charterparty.'" And at the end of his judgment he says, "*There must be a plain intention expressed* that the consignee of the bill of lading is to pay demurrage before he can be charged with it. This is an established rule, to which it is highly important to adhere."

So in *Fry* v. *Chartered Bank of India* (5), the charterparty made the goods deliverable on payment of freight at 3*l.* 10*s.* per ton, the ship to have a lien on cargo for freight. The terms of the bill of lading were "Freight for the said —— payable in Liverpool as per charterparty." It was contended that the defen-

(1) 4 E. & B. 945; 24 L. J. (Q.B.) 257.

(2) 5 E. & B. at p. 590.

(3) 10 C. B. (N.S.) 802, 810; 31. L. J. (C.P.) 58.

(4) 15 C. B. 285; 24 L. J. (C.P.) 25.

(5) Law Rep. 1 C. P. 689.

dants, the holders of the bill of lading, were liable for the unpaid freight of the whole cargo. The Court decided against the claim. "The charterparty," says Erle, C.J., "also contains the clause, 'ship to have a lien on the cargo for freight,' and it is said that this entitles the shipowner to a lien on each part of the cargo for the whole freight. I think the judgment of Willes, J., in *Chappel* v. *Comfort* (1) applies in terms to this case, and I agree with it, that if it is wished to include more of the terms of the charterparty,"—i.e., more than to make the freight payable as per charterparty,—"words ought to be introduced into the bill of lading which would shew that intention *more plainly*." The plaintiff's counsel, however, relied strongly on the case of *Wegener* v. *Smith* (2). The case, as reported, states that the action was for demurrage, without saying whether for delay at the port of loading or discharge. The charterparty provided for the delivery of the cargo at a certain measurement freight; and in case of detention the captain to be paid 5*l.* for every proveable lay-day. The bill of lading made the goods deliverable to order "against payment of the agreed freight *and other conditions* as per charterparty." The Court held that by the words "and other conditions," the liability to pay demurrage was incorporated into the bill of lading, and they decided in favour of the plaintiff. This would be a strong case in favour of the present plaintiff if the demurrage therein claimed had been in respect of delay at the commencement of the voyage; "but it has been ascertained on inquiry," says Lord Campbell in *Smith* v. *Sieveking* (3) that "the demurrage sued for in that case had accrued in the port of delivery, and had arisen from the default of the defendant in not sooner receiving the goods." And upon the case being again cited in the Court of Error (4), Jervis, C.J., remarked, that "the action was for demurrage accruing from his (the defendant's) own delay in the port of discharge." These remarks were intended to point out that the case is not inconsistent with the doctrine laid down in *Smith* v. *Sieveking* (5). The case of *Kern* v.

(1) 10 C. B. (N.S.) 802, 810; 31 L. J. (C.P.) 58. *S Jur* N S 177.
(2) 15 C. B. 285; 24 L. J. (C.P.) 25.
(3) 4 E. & B. at pp. 951-2; 24 L. J. (Q.B.) at p. 259. *1 Jur* N S 825
(4) 5 E. & B. at p. 591.
(5) 4 E. & B. 945; 24 L. J. (Q.B.) 257; 5 E. & B. 589. *1 Jur* N S 824, 1135

1871

GRAY v. CARR.

Deslandes (1) was also relied on. And certainly in it effect was given to a claim for a lien as being introduced from the charter-party into the bill of lading, though the words of the bill of lading were only "he or they paying freight for the said goods as usual." Great stress was laid by the Court in that case on the fact that the defendants, the consignees claiming under the bill of lading, were mere agents of the charterers. Unless the decision can be supported on that ground, which it seems unnecessary at present to determine, I think it cannot be supported at all. It is stated with some significance by the learned reporters at the end of the case, that "Error was brought upon this judgment; but the matter was compromised before argument." The rule or canon of construction seems then to be that which is laid down by Willes, J., in *Chappel* v. *Comfort* (2), namely, no liability other than such as naturally attaches in respect of the carriage of the particular goods is to be held to be imposed on a consignee of goods mentioned in a bill of lading, *unless such liability is clearly imposed by plain words.* Applying that rule to the bill of lading in the present case, it seems to me that we ought not to hold that any liability attached against the defendants in respect of dead freight, demurrage, or damages in the nature of demurrage, incurred at the port of loading. The words, "and all other conditions or demurrage, if any should be incurred," are satisfied by making them applicable to damages in the nature of demurrage for any delay which may occur through the default of the consignee at the port of discharge. Indeed, they are rather apt to such a liability in the present case; because by the charterparty no specified number of lay days is allowed at the port of discharge, and no demurrage strictly so called is provided for. The ship is to be discharged as fast as ship can put the cargo out. The bill of lading may therefore be construed as if the phrase, "conditions or demurrage" were intentionally alternative, that is to say, applicable to a claim which may more properly be called a condition in the nature of demurrage. The proposed construction also gives full value to the words "for the said goods." At all events the bill of lading does not clearly and plainly apply to claims made in respect

(1) 10 C. B. (N.S.) 205; 30 L. J. (C.P.) 297. (2) 10 C. B. (N.S.) 802; 31 L. J. (C.P.) 58.

1871

GRAY v. CARR.

of transactions which occurred before the particular goods were on board, and not in respect of those goods, and which claims, therefore, when made against persons in the position of the defendants are, to say the least, not reasonable.

I therefore am of opinion that the judgment below ought to have been wholly in favour of the defendants. I think that the part of the judgment which was in favour of the plaintiff for 80*l.* for demurrage ought to be reversed, and the part of the judgment which was in favour of the defendants as to dead freight and damages ought to be affirmed.

Since this case was argued, and since this judgment was written, our attention has been called to the case of *McLean* v. *Fleming* (1), in the House of Lords, and if I had thought that that case overruled anything I have said in this I should have willingly bowed to it. But in that case, as I understand the judgment, the charterparty was in respect of the carriage of a uniform cargo, and the freight was payable at a fixed sum per ton, and the charterparty ascertained the amount of the cargo that was to be loaded. It then put upon the charterers the liability of loading a full cargo, and gave a lien to the shipowner for dead freight. Now, under those circumstances it was pointed out by some, if not all of the learned Lords who took part in the judgment, that the damages for not loading a full cargo were, in point of fact, ascertained, because they would be the specified amount per ton upon the quantity that was really ascertained; and if that were so, that would properly be dead freight within the ordinary meaning of the term, and the lien being given in terms for dead freight, that case would be within the recognised rule; and, as I understand their Lordships, they declined to overrule the case of *Kirchner* v. *Venus* (2), and expressly declined to overrule the case of *Pearson* v. *Goschen* (3), which I think is decided on valuable principles that ought to be generally applied. I therefore do not consider that that case overrules what I have said of this charterparty.

With regard to the question on the bill of lading, even although the charter in this case did give a lien for dead freight, it seems to

(1) Since reported, Law Rep. 2 H. L. Sc. 128; and see note at the end of this case.

(2) 12 Moo. P. C. 361.

(3) 17 C. B. (N.S.) 352; 33 L. J. (C.P.) 265.

1871

GRAY v. CARR.

me that the authority in the House of Lords leaves the case untouched, because the House of Lords, in the case before it, came to the conclusion that the action was between those who were virtually the charterers and the shipowner, and therefore they decided the case on the charterparty alone, and held only that the fact of bills of lading being given to a charterer cannot alter or affect his liability under the charterparty. They seem to me to have decided the case on the charterparty alone. It therefore seems to me that that case does not affect this case, and I adhere to the judgment which I had already written.

The case seems to me to be one of great importance, because bills of lading are the documents on which goods are bought and sold before ships arrive, and if the value of the bill of lading is to be dependent on an unascertained amount to be paid in respect of antecedent transactions which cannot be known, any legitimate, in the sense of wholesome, traffic in such a document cannot be undertaken. This consideration leads to the same conclusion as the legal reasoning which has been before applied.

CHANNELL, B. In this case I think the judgment of the Queen's Bench should be affirmed.

The question is, whether the plaintiff, who is a shipowner, has a lien on certain timber carried in his ship, as against the defendants, who are indorsees of a bill of lading relating to the timber, for all or any of three distinct claims.

These claims are, first, 80*l.* for demurrage incurred by the detention of the ship at the port of loading for ten days, during which, according to the terms of the charterparty, the charterer, if he detained the ship, was to pay 8*l.* per day demurrage; secondly, a further claim for damages for the ship's detention for a further period of eighteen days beyond the ten days; and thirdly, a claim for what is called dead freight, which is said to be incurred in consequence of a full cargo not having been loaded. It is clear that the plaintiff can only have a lien for any of these claims by express contract, inasmuch as the lien which, as shipowner, he would have independently of any contract would only extend to the actual freight of the goods carried: *Phillips* v. *Rodie* (1); *Birley* v. *Glad-*

(1) 15 East, 547.

1871

GRAY v. CARR.

stone. (1) Further, although the charterparty may contain an express contract giving him such a lien on the goods as against the charterer, yet he could not have the lien as against the indorsee of a bill of lading, unless it is stipulated for in the bill of lading, either by the incorporation of the clause in the charterparty, or by its being expressly mentioned. The question what lien a shipowner has against the holder of a bill of lading therefore reduces itself into a question of construction, either of the bill of lading alone, or of the bill of lading and the incorporated charterparty combined, as the case may be: see *Wegener* v. *Smith* (2); *Smith* v. *Sieveking.* (3)

It is important, however, in construing these documents, to consider both the nature of a lien and the nature of the demands in respect of which a lien is claimed. In *Phillips* v. *Rodie* (4), the difficulties which would be created by a lien for an uncertain amount are pointed out. Where the amount of the demand in respect of which the lien is claimed is capable of being calculated, the holder of the bill of lading will know what to tender; but where the demand is for unliquidated damages no tender can be made; and therefore, except by some arrangement between the parties, such as was arrived at in the present case, but which could not be possible where the solvency of the holders of the bill of lading was at all doubtful, the goods must be detained until these damages have been ascertained. In the very probable case of the parties as against whom the damages have to be fixed being foreigners, or, indeed, in any case, it is obvious that very considerable delay must take place. In the mean time the goods may deteriorate in value. The greatest inconvenience would therefore be caused by construing the shipowner's lien to extend to unliquidated damages for breach of the charterparty; and although it is not, of course, impossible for the parties to contract for a lien for such damages, unless there was in the contract a very clear expression of their intention to do so, the Court would not so construe the contract.

In the present case both the charterparty and the bill of lading

(1) 3 M. & S. 205.
(2) 15 C. B. 285; 24 L. J. (C.P.) 25.
(3) 4 E. & B. 945; 24 L. J. (Q.B.) 257; 5 E. & B. 589.
(4) 15 East, 547.

1871

GRAY v. CARR.

mention a lien for "demurrage." I think there can be no question that this extends to the 80*l.* claimed for the ten days during which the charterers detained the ship, as provided for by the charterparty. The plaintiff is therefore entitled to this amount, as decided by the Queen's Bench.

As regards the further detention for eighteen days, the damages for this are not demurrage at all, properly so called. Demurrage is a sum agreed to be paid for the detention of a vessel, and the term is not applicable to the damages caused by detaining her contrary to agreement. I have therefore no doubt at all that the plaintiff is not entitled to any lien for the damages caused by the further detention for eighteen days.

The point of most difficulty in the case is that relating to what is called "dead freight." The charterparty gives the shipowner a lien for "dead freight," it does not, however, in any other way mention any dead freight, nor does it contain any covenant that full freight shall be paid on all the ship could carry, whether a full cargo is loaded or not. The bill of lading provides that the holder shall pay "freight and all other conditions and demurrage (if any be incurred) for the said goods as per the said charterparty." I think this sufficiently incorporates the charterparty to entitle the shipowner to insist as against the defendants on any lien which he would have under the charterparty for what there is called "dead freight:" see *Wegener* v. *Smith.* (1) The question, however, is, what is the true meaning of the expression "dead freight," so used in the charterparty, and does it cover the claim in the present case, which, as pointed out by Lord Ellenborough in *Phillips* v. *Rodie* (2), is not freight at all, but is unliquidated damages for the loss of the freight? In that case, Lord Ellenborough says, that in order to give the lien claimed, "the covenant should have been to pay full freight as if the goods had been actually loaded on board, and that the master should have the same lien upon goods actually on board as if the ship had been fully laden with all goods covenanted to be loaded." In the present case, the latter part of the suggested covenant, or something like it, is found, but not the former. It is true that, if we hold that "dead freight" in the charterparty does not include unliquidated damages for loss of

(1) 15 C. B. 285; 24 L. J. (C.P.) 25. (2) 15 East, 547, 555.

freight, we give no effect to the expression at all. I agree, however, with what was said on this point by Williams and Willes, JJ., in *Pearson* v. *Goschen* (1), that when these words occur in an ordinary clause in a mercantile contract it is not necessary to find an application for them in the particular case. If the charterparty had provided for any dead freight, strictly so called, being payable, the clause would have taken effect and conferred a lien, but as it is, it does not take effect, because there is nothing for it to apply to. In the case last referred to, the point in the present case was really decided, as the Court held that a clause giving a lien for "dead freight" was wholly inapplicable to a claim for damages in respect to the charterers having failed to load a full cargo. In this Court we should not be bound by that decision if we did not agree with it; but I do agree with it, and adopt the reasoning on which it proceeds.

We have been pressed in the argument with the clause in the charterparty that the charterers' responsibilities are to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at the port of discharge. It has been contended that all the charterers' responsibilities for all breaches of contract were to cease on shipment; and that therefore it must have been intended that there should be a lien on the goods, otherwise the shipowner would be without remedy. It is not, of course, necessary for us to decide whether the charterers were or were not relieved from responsibility in respect of the claims which we now decide the shipowner cannot maintain against the defendants. As at present advised, however, I think this clause does not apply. At all events, it contains nothing to induce me to put a different construction on the previous clause than I otherwise should. Probably the charterers' responsibilities which are to cease are the responsibilities in respect of those matters for which a lien is created; but the difficulties in the way of creating a lien for unliquidated damages, and the stipulation that the cargo is to be of sufficient value to cover the freight and charges only, and not the freight charges and all damages, afford a stronger argument for holding that there is no lien and therefore no cesser of responsibility of the charterers as regards the damages,

(1) 17 C. B. (N.S.) 352, 373, 376; 33 L. J. (C.P.) 265.

1871

GRAY v. CARR.

than for holding that there is a cesser, and therefore a lien. A case of *Bannister* v. *Breslauer* (1) has been quoted, in which it was held that, under somewhat similar though stronger words in a charterparty, the charterers' responsibility for demurrage did cease. If the demurrage there referred to was demurrage properly so called, then I agree with the decision. If, however, as certainly rather appears to have been the case from the report, it was merely unliquidated damages for detention of the ship, then I think the decision somewhat doubtful, and to be supported, if at all, by the fact that the words as to the cesser of responsibility were stronger there than here. The attention of the Court there does not appear to have been drawn to the fact that the demurrage there claimed was not demurrage, properly so called, but only unliquidated damages, and therefore the opinion of the judges that a lien was created for this so-called demurrage, is not entitled to the same weight as I should be disposed to give it, if the point had appeared to have been carefully considered. Besides which, it was merely an opinion not absolutely essential to the decision of the case, for although unlikely, it is not impossible, that the parties should so contract as to make the responsibility of the charterer cease, although no lien was effectually created. In such cases where damages have been incurred prior to the shipment, it would be prudent for the master to refuse to sign any bills of lading which did not give express notice to the indorsee of the claim for damages which had accrued, and stipulate for its payment.

For these reasons, I am of opinion that the judgment of the Queen's Bench should be affirmed on all points.

After the argument of this case, and I had written what I have read as my judgment on the point of dead freight, our attention was called to the case of *McLean* v. *Fleming* (2), decided by the House of Lords on the 3rd of April last. The delivery of the judgment of this Court was postponed till we had an opportunity of inquiring into the case of *McLean* v. *Fleming*. My Brother Bramwell considers the decision in the House of Lords governs this case, and must govern him, whatever his opinion otherwise

(1) Law Rep. 2 C. P. 497.

(2) Since reported; Law Rep. 2 H. L., Sc. 128; and see note at the end of this case.

would have been. My Brother Brett, for reasons he has given, considers that *McLean* v. *Fleming* does not apply. Other of the judges, including myself, take the same view of the effect of the decision in *McLean* v. *Fleming*. If I considered the decision of the House of Lords as one which governs the present case, of course I should be bound by it, and should withdraw so much of the judgment respecting the point of dead freight as I had prepared and have read; but thinking that the decision of the House of Lords does not govern the present case, I abide by the opinion that the plaintiff cannot recover his claim for dead freight; and I therefore think the judgment of the Court of Queen's Bench should be affirmed on all points.

BRAMWELL, B. (1) The questions in this case depend on the construction of the bill of lading and charterparty. The former refers to the latter; the captain is "bound to consign his cargo as per charterparty dated London, 18th August, 1866," and payment is to be made as "per the aforesaid charterparty." A copy of this charterparty was sent to the defendants with the original bill of lading. The bill of lading, then, must be construed in connection with the charterparty and the surrounding circumstances;—perhaps, as the bill of lading is negotiable, not all the surrounding circumstances that would be applicable as between charterer and owner; but one, at least, must be borne in mind, viz., that the defendants were consignees of the whole cargo.

This being so, it seems to me that the best way to examine the matter is first to ascertain the meaning of the charterparty. It was said by the plaintiff that the effect of it was, that on the loading of the cargo the responsibility of the charterer ceased; as well for all things future as for those past; and that therefore a right must be taken to be given, against the person entitled to receive the goods under the bill of lading, to withhold them till satisfied all claims which otherwise would have been enforced against the charterer. It is not strictly necessary to decide this, perhaps, because it may be that from the form of the bill of lading no right is given against the defendants, although all rights are lost against the charterer; and on the other hand it may be, that by the terms of

(1) This judgment was read by Willes, J.

1871

GRAY v. CARR.

the charterparty, rights remain against the charterer, while by those of the bill of lading they are given against the defendants. But the argument is so important, an answer one way to the question would be so cogent in favour of the plaintiff, that it is necessary to consider it minutely. It seems to me that the plaintiff is wrong in his contention on this point. I do not think that the parties intended, nor that they have expressed an intention, that the charterer's responsibilities for causes of action then accrued should be extinguished on shipment. Agreements should be construed on the principle that parties when making them contemplate keeping, not breaking them. I do not think this charter contemplated that the charterer will *break* his contract. It is true the words "dead freight" are used, which certainly are unmeaning in this case, except they provide for the case of a short cargo contrary to the charter. What meaning, if any, is to be given to them, I shall have to examine presently; but I think they are not sufficient to shew that "responsibilities" mean "responsibilities for past breaches of agreement." Again, the charterer's "responsibilites" are to "cease." It is a verbal criticism, but the right words would be "be extinguished" as to accrued claims. Further, they are "to cease on shipment *of the cargo*, provided *it* be of sufficient value to cover the *freight and charges* on arrival at *port of discharge*." So that it must be of sufficient value to cover the *freight and charges*. But why should the shipment of a cargo of sufficient value to cover *freight and charges* extinguish an already incurred claim for short loading, demurrage, and detention over the demurrage days? Again, it must be of that value "on arrival at port of discharge." So that if damaged on the voyage to a less value, the other responsibilities would exist. Further, they are to cease on shipment of *the* cargo, i.e., a full cargo. That is a good reason why the responsibility to ship a full cargo should cease, viz., because it has been done; but why is it a reason why responsibility for delay in loading should cease? Why should shipping a short cargo not only be a cause of action in itself, but also keep alive the cause of action for delay in shipping? It is also certain that all breaches of contract by the charterer are not provided for by a remedy against the person entitled under the bill of lading. For if there was no advance at the port of loading, an action would lie

against the charterer; but clearly there is no lien on the goods for the damages thereby recoverable. Of course that is not decisive; it may have been overlooked. But it is an argument. I am of opinion on this part of the case that the responsibilities which are to cease are those which the shipowner, without loss to himself, may render unnecessary in the case supposed, viz., responsibilities for the freight and charges to cover which the cargo is of sufficient value on arrival at port of discharge. The clause should be read thus: "and on shipment of the cargo, provided it is of sufficient value to cover the freight and charges on arrival at port of discharge, the charterer's responsibilities to cease, for such freight and charges." It is said this opinion is inconsistent with the case of *Bannister* v. *Breslauer*. (1) If so, I respectfully intimate my doubt of that decision. But it is to be observed that every case such as this, where no general principle of law is involved, but only the meaning of careless and slovenly documents, must depend on its own particular words. I may observe that in one sense this question does not arise. For if the plaintiff is right "*the* cargo" has not been shipped, but something short of the cargo. However, to help the construction of the bill of lading the question does arise; but for the reasons I have given, it should, I think, be answered unfavourably to the plaintiff.

Putting this meaning on this part of the charterparty, it is next convenient to examine what lien by the charterparty would be reserved against the party entitled to the goods, whom I will call "consignee." The owners are to have an absolute lien for all freight, dead freight, demurrage, and average. The doubts are as to dead freight and demurrage. First, does dead freight include short loading? In strictness, it does not. Dead freight apparently, in strictness, means some agreed sum, fixed or capable of calculation, for short loading. Now, it is certain that general damages, which are all the plaintiff could recover here, are something very different from that. Here the plaintiff might recover more than a sum equal to the charter freight for goods carried; or less, if he filled up advantageously elsewhere. Why, then, are these words, which do not naturally signify damages for short loading, to be held to do so in this case? The burthen of shewing

(1) Law Rep. 2 C. P. 497.

1871

GRAY v. CARR.

this is on the plaintiff. The argument he uses is, that, unless so interpreted, the words "dead freight" have no application; that a meaning ought to be given to them if they are capable of it; that damages for short loading are often called "dead freight"; that words may be construed in a secondary sense when not applicable in their primary sense; that otherwise no lien is given for dead freight, though the parties intended to give very extensive liens. This argument is, I think, of great force; still its value must be tried and compared with arguments the other way. Those arguments seem to be these: That the parties might have said "damages for short loading" in so many words if they had thought fit; that, as they have not done so, those who have to decide on the charter ought not to say so, without almost a necessity for so doing; that no such necessity exists here: for that, although it is a rule that a meaning should be given to all words if they are capable of one, there is no rule that it must be done in all cases; and that when it is remembered that the forms of these documents are prepared in the same words in print, whatever particular stipulations may be introduced in each, it is more right and more natural to add the words "if any" to all such general words as those in question (as was done in the case of *Cross* v. *Pagliano*) (1), than to give any such secondary meaning; for that where a secondary meaning is given to words incapable of their primary meaning the words properly have that secondary meaning, as where "son" is held to mean "illegitimate son" where there is no legitimate son. Further, to suppose that a lien is given for damages for short loading is to suppose that the parties contemplated that the agreement would be broken, not kept, which is a wrong way of construing agreements, as, presumably, parties making them contemplate keeping them. Now, when dead freight is agreed to be paid, the charterer has the *right* to load a short cargo on paying the dead freight. Another argument against the plaintiff is, that the construction he contends for is inconvenient; that it is not likely a merchant would charter a ship in such terms that he would not be entitled to a bill of lading without the goods in it being liable to a thing so uncertain and open to dispute as a claim for short freight; and that, though in this case

(1) Law Rep. 6 Ex. 9.

there is but one bill of lading, there might have been several, and the goods in each subject to this claim. Which of these reasonings should prevail might be matter of much doubt but for the case of *McLean* v. *Fleming* (1), recently decided in the House of Lords, where a lien for "dead freight," under circumstances very similar to those of this case, was held to give a lien for damages for short loading. *Pearson* v. *Goschen* (2) is, no doubt, the other way, though certainly there the matter was rather assumed than determined. Anyhow, if it conflicts with *McLean* v. *Fleming* (1), of course the latter must prevail.

It remains to consider, as to this point, whether, the shipowner having a right to this lien, that right has been preserved in the bill of lading. But I will first examine what other liens are given by the charterparty. Analogous considerations to the foregoing shew, to my mind, that "demurrage" means demurrage strictly so called. In the first place, demurrage, though sometimes used to signify any undue delay in loading, is an expression in common use to signify an agreed time, and is so used in this charterparty. Demurrage proper is contemplated by this charter, and the word therefore is satisfied; so that, if the plaintiff is right, "demurrage" would have two meanings, viz., "demurrage proper," and "damages for detention," which may be at a greater or less rate than the agreed demurrage. In the next place, there is the argument that the parties are not to be taken to contemplate breaking their agreement. In the result, then, I think the charterparty enables the owner to insist on a lien for demurrage strictly so called, but not for delay in loading ultra the demurrage days.

If, then, these are the proper constructions of the charterparty, what is that of the bill of lading? If the master has not reserved the liens he was entitled to, or has stipulated for those to which he was not entitled, why has he? Shortly, the meaning to be expected in the bill of lading is one in conformity with the charterparty. Let us examine it. The goods "are to be delivered unto order or his or their assigns, he or they paying freight and all other conditions or demurrage if any should be incurred for the

(1) Law Rep. 2 H. L., Sc. 128; and see note at the end of this case.

(2) 17 C. B. (N.S.) 352; 33 L. J. (C.P.) 265.

1871

GRAY v. CARR.

said goods, as per the aforesaid charterparty." It is certainly impossible to speak with confidence as to the meaning to be put on this document. In the first place, the word is "or" demurrage. Of course this must be read "and." Then the words are, "if any should be incurred." This means, on the face of it, I suppose, "should *thereafter* be incurred." But when it is remembered that the charter "per" which this is to be paid makes no provision for demurrage at the port of discharge (and it certainly does not), while it does for demurrage at the port of loading, and when it is remembered how commonly the mistake is made of using the "should" or "shall be" for "shall have been" to comprehend possible past and future, must not this be read as a bit of bad grammar for "if any shall have been incurred"? It seems to me it must be so read, especially when read in conjunction with the words "he or they paying freight, and all other conditions."

These words I now have to consider in reference to the remaining question, viz., is there a lien under the bill of lading for the damages for short loading? But for the words "all other conditions" there clearly would not be. But those words must be read as "performing or satisfying all other conditions" for the said goods as per the aforesaid charterparty: for "paying" conditions is insensible. But if I am right in my construction of the charterparty, one of the conditions the consignee might be required per the charterparty to satisfy in order to have the goods is paying damages for short loading under the name of "dead freight"; for it seems to me that the word "conditions" has no application, unless it is to secure the liens to which the shipowner is entitled by the charterparty. It supposes the performance of some condition precedent or concurrent by the consignee. What? What is he to do by the charterparty? Pay freight? That is expressly provided for. Unload as fast as the ship can put the cargo out? But that is not a condition precedent or concurrent to or with his having the cargo. He may be bound so to unload, but not *for* "the goods"; for he must have them, whether he unload at that rate or otherwise. Besides, that would only be one condition, and not *conditions*. The clause about heated or damaged condition does not create any condition to be performed, but provides for a way in which, in a certain event, the freight is to be computed.

It seems to me, then, that by the charterparty there is a right to insert in the bill of lading a lien for the demurrage and dead freight, or damages for short loading; that there is no reason to suppose the captain intended to give up that right; that there are words sufficient to carry it; that those words have no application unless they have that effect; and that consequently they have that effect, and the plaintiff is entitled to his lien for those damages and demurrage. It is said that the words are "paying for the goods." I think that the words must be read "paying and satisfying all other conditions for the goods"; for "paying conditions" for the goods is insensible. Even then it is argued that the paying and satisfying are to be "*for* the goods," which means "for the carriage of the goods." I do not think so. It means "to have the goods." Demurrage is not paid for the carriage of the goods, but for delay in loading, nor is average; yet, by the bill of lading, demurrage and average may have to be paid *for* the goods, which must mean "to have them." *Smith* v. *Sieveking* (1) is cited to shew that those words "for the goods" are to be so understood; and certainly that case tends that way. But *Wegener* v. *Smith* (2) is an authority the other way. And it seems to me clear that each of those cases must depend on the very words used. Here, again, the argument is used, that if there were several consignees and several bills of lading it would be impossible to construe them in this way; that either there would be liens on small parcels for large damages, or other difficulties would arise. I doubt the difficulty practically. But the question does not arise. There is only one bill of lading. It may be if there were several it would be impossible so to construe them, though I do not think so. But, if so, the conclusion to be drawn is, that in that case the bills of lading would have been differently framed. In this particular case (if such a matter may be noticed) the fact is, that "all other conditions" are inserted in writing in an otherwise printed form obviously for some important purpose. While the clause about demurrage, "if any should be incurred," is in print, and good enough, at the time of printing, to comprehend all demurrage, whether incurred before or after the signing of the bill of lading.

(1) 4 E. & B. 945; 24 L. J. (Q.B.) 257; 5 E. & B. 589.
(2) 15 C. B. 285; 24 L. J. (C.P.) 25.

1871

GRAY v. CARR.

Supposing that by the words "demurrage, if any should be incurred," no lien for the demurrage anterior to the bill of lading would be given, I think it would be given by the words "all other conditions." I think those words, for the reasons I have given, would suffice without express mention of demurrage, and I think that express mention does not lessen their effect.

In conclusion, I think the plaintiff entitled to a lien for the demurrage, and the dead freight or damages for short loading; and that the judgment should be affirmed as to the former, and reversed as to the latter. But I speak with great doubt, seeing the state of the authorities, and knowing the different opinions entertained on the questions, and considering what they are, viz., what meaning is to be put on loose and careless expressions? But I cannot help thinking that if we decide against the plaintiff, he will lose a benefit he clearly meant to have, and the charterers intended he should have. The questions ought to have no importance except to the parties interested, and except as a warning to others not to let them arise again.

WILLES, J. I entirely concur with the judgment delivered by my Brother Brett—a judgment written with such fresh and accurate acquaintance with the mercantile and maritime law applicable to the subject, that I will not attempt to add anything.

KELLY, C.B. Three questions arise upon this appeal. One, and the most important, for it governs the entire case, is whether the words interlined in the bill of lading so far incorporate into that instrument the conditions in the charterparty as to entitle the plaintiff to a lien upon the cargo, of which the defendants have become the owners under the indorsement of the bill of lading. The first point is as to demurrage in respect of the ten days from the 8th to the 18th of December, amounting to £80. Under the bill of lading the cargo was to be consigned "as per charterparty," and the cargo is to be delivered "as per charterparty unto order or assigns, he or they paying freight *and all other conditions*" [these words being interlined in writing in the printed bill of lading] "or demurrage, if any should be incurred for the said goods, as per the aforesaid charterparty." This must be read as paying

freight and demurrage, if any; and the question is, how much of the charterparty is imported into the bill of lading by the words interlined in the bill of lading, "and all other conditions?" These words must be read "performing all other conditions," to make them intelligible and sensible. When we look to the charterparty, we find after the provision for the payment of the freight on unloading, and for fifty lay days from the 15th of October, and ten days on demurrage at 8*l.* per day, the charterparty proceeds thus: "The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average, and the charterer's responsibilities to cease upon shipment of the cargo, provided it be of sufficient value to cover the freight and the charges upon arrival at the port of discharge." And the question is, whether this condition is binding upon the defendants under the words "and all other conditions" interlined as before mentioned.

I think it is. First, because these words cannot be treated as words of form and superfluous, or as having no meaning or effect, seeing that they are introduced expressly and in writing by interlineation in the printed bill of lading, and must, therefore, point to something intended and distinctly agreed upon between the parties; and I see no other condition to which they can apply, but the very important one that the owner was to have a lien upon the cargo for all freight, dead freight, and demurrage.

It has been contended that the words apply only to any condition touching these goods, the freight payable under the bill of lading being the freight only for this shipment; but I think the reasonable interpretation is, that any and every condition is imported which affects in any way the interests of the owner, or of the defendants in relation to the cargo thus consigned. I do not say that notice of the contents of the charterparty would have bound the defendants by this condition, but assuming the words to mean "performing all other conditions," I think the only reasonable effect to be given to them is to preserve to the owner the lien for which he had stipulated upon the cargo consigned to the defendants, which otherwise they would not have been liable to satisfy. It is unnecessary to determine whether, upon the shipment of this cargo, the liability of the charterer and the lien of the owner altogether ceased, as well in respect of demurrage

1871

GRAY v. CARR.

already incurred, as of any species of liability that might afterwards arise; for whether such liability wholly or in part continued or ceased, the owner might claim the benefit of his lien against the consignee of the cargo, either as a substituted or an additional or a collateral security for the freight and demurrage. No case has been decided in which the question has turned upon words like these; we must, therefore, decide this case according to what we believe to have been the intention of the parties, to be collected from the language of the two instruments taken together. It is true that, had the two constituted but one contract between the owner and the consignees, it is most unlikely that the consignees would have allowed their cargo to stand as a security for demurrage already incurred, and not by reason of any act or default of theirs; but we must remember that the charterparty was entered into between the owner and the charterer before it could be known what compensation the owner would become entitled to, whether in respect of freight or demurrage, or any other incident of the adventure. I think, therefore, that the verdict for the plaintiff for 80*l.* ought to stand, and the judgment of the Court of Queen's Bench upon this point should be affirmed.

The next question is, whether the lien extends to the compensation claimed for the detention of the ship after the lapse of ten days on demurrage. Now the words are, "freight, dead freight, demurrage, and average;" and it seems to me impossible that this claim should come within either of these words. I think, therefore, the judgment below must also be affirmed upon this point.

It remains to be considered whether the claim to unliquidated damages for the not having shipped a complete cargo can be claimed as dead freight, and so brought within the lien to which the owner was entitled. Now, inasmuch as we have no means of ascertaining the amount of these damages, except by consent or by the verdict of a jury, they cannot be brought within the strict legal meaning of the term "dead freight," which must be a sum ascertained or ascertainable by the charterparty itself, as where a complete cargo is agreed to be 1000 tons at a specific sum, as 20*s.* per ton; and, therefore, the term "dead freight" in this condition must mean the unliquidated damages for not

shipping a full cargo, or it has no meaning at all with reference to the whole effect of this charterparty. But we often find words in these printed instruments which are so framed and introduced as to be applicable to a great variety of different cases, and which have no application at all, and therefore no meaning and effect whatever in the particular case in which such a question as this arises. I am far from saying that a different construction is to be put upon words in print and words in writing; but it may be in an instrument of either character, but more especially where it is in a printed form, that a word or term of this description must be read with the implied addition of the words "if any." After all, we are in this case to draw our own inferences as to the meaning of the parties in the use of these words, and if they are doubtful, and there be no evidence on the one side or the other of their bearing a particular meaning among commercial men, we must put such a construction upon them as we think calculated to give effect to the real intention of the parties; and if they are of a doubtful import, they should have a reasonable interpretation; and it certainly does not seem reasonable that these parties should have agreed upon a lien like this, the effect of which would be, that whenever the cargo becomes deliverable upon the arrival of the ship, it will be impossible for the consignees to satisfy the lien and to obtain possession of their property, unless by agreement between the parties as to the amount of damages claimed by reason of the deficiency of the cargo, a matter upon which they are very unlikely to agree, or by means of the verdict of a jury or the award of an arbitrator, which might not be obtained for months, or even for years, after the arrival of the vessel.

I may add, that if we are to put a strictly literal construction upon these words, a claim to damages by reason of the shipment of a deficient cargo cannot be brought within the true meaning of the word "freight," which imports a sum certain to be paid in respect of the conveyance of goods in a ship, and therefore the term "dead freight," as well observed by Lord Ellenborough in the case of *Phillips* v. *Rodie* (1), cannot be properly used as designating the unliquidated damages recoverable by reason of the breach of a contract to ship a full and complete cargo. And

(1) 15 East, 547.

1871

GRAY v. CARR.

this view of the question last raised being supported by the case of *Pearson* v. *Goschen* (1), I think that the plaintiff cannot be entitled to a lien for a short shipment, as in this case, under the term "dead freight." I have, indeed, great difficulty in understanding how a lien can exist for a sum of money, not ascertained at the time when the goods upon which the lien is supposed to attach are deliverable according to the contract, nor capable of being ascertained but by the award of an arbitrator or the verdict of a jury. But since this case was argued, we have been informed of the judgment delivered by the House of Lords in a case of *McLean* v. *Fleming* (2), and in which it was held that damages by reason of the shipment of less than a full cargo might be recovered as dead freight, and we are no doubt bound by that decision. In that case, however, the amount of the damages was capable of being at once ascertained, inasmuch as the short shipment was of the specific quantity of 210 tons of bones, the stipulated freight being 35*s.* per ton. This is in the nature of dead freight, strictly so called, and is thus distinguishable from the case now before the Court. Upon the whole, therefore, I am of opinion that the judgment of the Court of Queen's Bench should be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Shum & Crossman.*
Attorneys for defendants: *Thomas & Hollams.*

(1) 17 C. B. (N.S.) 352; 33 L. J. (C.P.) 265.

(2) Since reported Law Rep. 2 H. L., Sc. 128. It may be convenient to give here shortly the facts and the material parts of the opinions of the learned Lords.

McLean & Hope, appellants; Fleming, respondent. House of Lords, April 3, 1871.

The appellants in Edinburgh bought a cargo of bones of Messrs. W. of Constantinople, to be forwarded to Aberdeen; and Messrs. W. obtained on payment of 50*l.* a transfer to them from C. of a charterparty of the ship *Persian*, of which the respondent was owner. Messrs. W. forwarded the charter to the appellants, and charged them with the 50*l.*, and other advances made in pursuance of the charter—all which the appellants paid.

The following are the only material parts of the charter; it was between the captain of "the ship *Persian*, of the measurement of 598 tons or thereabouts," and C., and it was "mutually agreed" that the ship should proceed to certain ports "and there load from the agent of the freighter a full and complete cargo of cattle bones in bulk," . . . and thence to a port in the United Kingdom, and

1871

GRAY v. GARR.

"deliver the same on being paid freight at the rate of 35*s.* per ton. The captain or owner to have an absolute lien on the cargo for all freight, dead freight, and demurrage. The cargo to be brought to and taken from alongside at charterer's expense, the ships' boats and crew to render all customary assistance in towing the lighters, &c."

Messrs. W.'s agents at the different ports shipped bones, and received bills of lading in the names of the appellants as shippers, "to be delivered unto order or to their assigns paying freight for the said goods as per charterparty."

The ship was forced to sail with a short cargo; and on arrival in Aberdeen it was ascertained that 386 tons only had been shipped, the measurement of the ship being from 596 to 598 tons; but she could have carried considerably more than that weight of bones. The respondent claimed a lien for "dead freight" to the amount of 367*l.* 10*s.*, being at the rate of 35*s.* a ton for 210 tons; and this amount the Lord Ordinary awarded to him, which award the Second Division of the Court of Session affirmed, the right to lien for short cargo being the only point raised, and the amount awarded not being disputed.

On appeal to the House of Lords:—

LORD HATHERLEY, C., in affirming the judgment, distinguished *Kirchner* v. *Venus* (12 Moo. P. C. 361), on the ground that there was there no such express contract as there was here. "Dead freight," though, as observed by several authorities, not a very accurate term, was intelligible enough. "Dead freight" had been defined by Lord Ellenborough in *Phillips* v. *Rodie* (15 East, at p. 555) as "unliquidated compensation for loss of freight." The question whether there had been an engagement by the parties for a lien for such unliquidated damages was matter of proof. There was no difficulty what the engagement here was. So much per ton had been agreed to be paid for a full cargo of a uniform description, and a full cargo had been agreed to be supplied, and there was no difficulty in ascertaining either the quantity of the cargo agreed for, or the amount agreed to be paid per ton. The payment was to be at the same rate in respect of the goods not supplied as for those supplied. Of course there might be always some difficulty in liquidating the damages, because it might be that the captain might have had it in his power to fill up the deficiency with other cargo; but that was not the case here. Another case (*Pearson* v. *Goschen* (17 C. B. (N.S.) 352) had been cited for the appellants; [after stating the facts and decision in that case] that case the House had been informed was likely to be brought before them on appeal, and it was therefore better to say no more upon it. It was enough to say that here there was a clear case of an omission to supply a full cargo as contracted for, and a clear case therefore for applying the definition of Lord Ellenborough as to what "dead freight" was—a definition exactly agreeing with that which is given in Bell's Commentaries (vol. i. p. 620, 7th ed.). As to the contention that the appellants claimed under the bill of lading, which did not incorporate the terms of the charterparty, the appellants were, to all intents, in the position of charterers, and were therefore bound by the terms of the charterparty. His Lordship was therefore of opinion that the judgment of the Court below must be affirmed.

LORD CHELMSFORD delivered his opinion precisely to the same effect; basing his opinion on the definition of "dead freight" by Lord Ellenborough, and distinguishing *Kirchner* v. *Venus*, and dismissing *Pearson* v. *Goschen* on the same grounds. This case could hardly be considered to be one of unliquidated damages, because

(1) 8 C 10 Jun 1903.

1871

GRAY v. CARR.

the master, not having brought home any other goods than those of the appellants, the proper measure of the shipowner's claim appeared to be the amount of agreed freight which he would have earned upon the deficient quantity of 210 tons. But whether the amount of the damages was to be regarded as ascertained or not, his Lordship was of opinion that the charterparty gave him a lien on account of the deficient cargo. Upon the second point, he agreed, for the same reason, that the lien was good as against the appellants. [Lord Chelmsford's opinion is given in extenso in Law Rep. 2 H. L., Sc. at p. 130].

LORD WESTBURY was of opinion that the stipulation for the lien for dead freight, without more, did not entitle the shipowner to have the deficient cargo assessed at the price per ton to be paid for the cargo shipped; but only entitled him to a reasonable sum by way of compensation, which was another phrase for unliquidated damages. On the second point the appellants were really the charterers; and their title under the bill of lading was controlled by their liability under the charterparty.

LORD COLONSAY agreed that the appellants were in the position of charterers. He could not find the slightest difficulty in holding, that under this charterparty there was a claim for "dead freight." It was not a very accurate expression, but it was the only expression we had for the claim which arises in consequence of the failure to furnish a full cargo. It was so described in the English authorities; and in the Scotch authorities, such as in Bell's Commentaries (vol. i. p. 620, 7th ed.), in his Law Dictionary and "Principles;" and it was a phrase which had also obtained a place in our mercantile authorities. As to the lien, his Lordship thought it was clear both on principle and authority that, if there be a stipulation in the charterparty that dead freight shall be exigible, and that there shall be a lien upon the cargo, then a lien was constituted by contract, although there was no lien for dead freight by law. Upon this, his Lordship adopted the words of Sir W. Grant in *Gladstone* v. *Birley* (2 Mer. at p. 404): "The question is whether there be a right to retain goods till a given demand is satisfied. The right must be derived from law or contract." The charterparty says in so many words that there shall be a lien for dead freight; and it made no difference that the words were in print: they were allowed to remain. The circumstance that the precise amount was not specified did not affect the principle. Questions of amount might arise even where the rate had been specified. In the present case there was no difficulty. It was not pleaded in the court below that the claim for 210 tons was an exorbitant claim, or one from which a deduction ought to be made. The vessel was proved to have been capable of carrying a great deal more; and there was no allegation that anything ought to be deducted from the sum awarded.

Interlocutor affirmed.

GORE AND OTHERS, APPELLANTS: THE SPECIAL COMMISSIONERS FOR ENGLISH FISHERIES, RESPONDENTS. 1871 *June* 3.

Salmon Fishery Acts, 1861 & 1865; 24 & 25 *Vict. c.* 109, *ss.* 4, 11; 28 & 29 *Vict. c.* 121, *s.* 39—"*Fixed Engine*"—"*Stop Nets.*"

By s. 11 of 24 & 25 Vict. c. 109, no fixed engine shall be placed or used for catching salmon in any inland or tidal water (except under certain circumstances), and a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed a "fixed engine;" and by s. 39 of 28 & 29 Vict. c. 121, "fixed engine" shall include any net fixed to the soil or made stationary in any other manner.

A "stop net" is used as follows: The fisherman fixes his boat athwart the current of the river by lashing it at each end to a pole driven in the bed of the river. The net, which is thirty feet wide at the mouth, and tapers to a point, is stretched by two poles twenty-two feet long, which are tied together at the upper end, and kept extended (to the width of the net at the mouth) by a pole lashed across at about seven feet from the upper end. The net is lowered overboard until the two poles rest at about eight feet from the upper end on the side of the boat. The net and poles are thus nearly on the balance, and the fisherman presses slightly on the upper end, and so keeps the net steady at about an angle of twelve degrees: he also holds a string attached to the bottom of the net, and when he feels a fish, he presses down the upper end of the poles with both hands, using the edge of the boat as a fulcrum, and so raises the net out of the water, and catches the fish:—

Held, that the "stop net" was a "fixed engine" within the definitions.

CASE stated by the Special Commissioners for English Fisheries pursuant to the Salmon Fishery Amendment Act, 1865, 28 & 29 Vict. c. 121, s. 45, which by sub-sec. 9 incorporates 20 & 21 Vict. c. 43.

The appellants made claim to use a stop net in a certain fishery called the Lower Crown Fishery, in the river Usk, and also a stop net in a certain other fishery adjacent, for a certain number of tides (of which stop nets the appellants were the owners) as being lawful engines, and not merely privileged fixed engines within the meaning of the Salmon Fishery Acts, and the commissioners having heard what was alleged and proved, gave their decision that the stop nets were fixed engines, but were privileged within the meaning of the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 39, and they certified, under s. 41, for the use of the stop nets in the places where they had been used.

By the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 11, no fixed engine of any description shall be placed or used for

1871

GORE v. ENGLISH FISHERIES COMMISSIONERS.

catching salmon in any inland or tidal water; "but this section shall not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant or charter, or immemorial usage;" and "for the purposes of this section a net, that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed a fixed engine." By s. 4 of the same Act "fixed engine" shall include stake nets, bag nets, putts, putchers, and all fixed implements or engines for catching or facilitating the catching of fish. And by 28 & 29 Vict. c. 121, s. 39, "fixed engine" shall include any net or other implement for taking fish fixed to the soil, or made stationary in any other way, not being a fishing weir or fishing mill-dam.

By the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 40, the special commissioners for English fisheries are authorized to inquire into the legality of all fixed engines erected or used for catching salmon within the limits of the Salmon Fishery Acts, 1861 and 1865, and to remove all such as are not proved to be privileged. And by s. 41 the commissioners shall, on proof being given that a fixed engine is privileged, certify to that effect, stating in the certificate the situation, size, and description of the engine.

The stop nets were used in the river Usk between Caerleon and the town of Usk, and the river at those places where the nets in question are is a tidal river and navigable, but not at the state of tide when the nets are in use.

It was proved that the mode in which these stop nets were used was as follows:—The fisherman on going out to fish with a stop net first steadies his boat athwart the current. This he does first by his anchor until he can set in position three long stakes or poles tipped with iron. One of these poles he pushes or works into the bed of the river from one end of the boat in a slanting direction, the second he works in like manner into the bed of the river from the other end of the boat, and a third pole is generally slanted in a direction transverse to the other two, from one end of the boat. These poles are lashed to the boat with ropes, and the combined effect of the poles, when set and penetrating the bed of the river, is to keep the boat still in one place and to prevent the current carrying it away, or to either side.

When the boat is thus steadied the fisherman puts his net over-

1871

GORE v. ENGLISH FISHERIES COMMISSIONERS.

board, which is about thirty feet wide at the mouth, and tapers to a point. The mouth, which faces the current, is distended by two light poles, called rames, which are tied together at one end with a rope, and which end the fisherman keeps his hand upon when fishing. The rames diverge from this upper end gradually until at their farthest end they stretch out the mouth of the net to its full width of about thirty feet. This stretching is facilitated by a cross stick or stretcher inserted between and fastened to the rames at about seven feet from the upper end, and this prevents the rames closing together.

The rames are about twenty-two feet long, and each lies over the edge of the boat, touching the edge at a distance of about eight feet from the upper end, where the poles converge. When the net is working, the rames point against the current in a slanting direction, and form an acute angle of about twelve degrees with the surface of the water, the lower ends being under water, so as to keep the bottom rope of the net about three or four feet below the surface. The upper ends of the rames meet and are tied together, being pressed upon by the fisherman's hand, as the net and poles are almost self-balanced.

The weight of the net and rames rests on the edge of the boat, the fisherman's hand being on the upper end, not to support or work the net, but merely so that he may be quite ready to jerk up the rames at a moment's notice into a horizontal position. A string is attached to the bottom of the net, and the fisherman, holding this string in his hand, feels when a fish enters or strikes the net, and immediately jerks the mouth of the net up out of the water so as to prevent the fish from escaping. The upper end of the rames could be equally well kept steady by tying it with a string to a part of the boat; but inasmuch as the fisherman must in any event be in a standing position to jerk up the rames on the instant, while he is so standing his hands or arms generally lean on that end of the rames, and thereby help at the same time to keep the rames steady. In jerking up the rames he uses the edge of the boat on which each rame rests as a fulcrum, but the rames are not tied to the boat. When the rames are raised to a horizontal position they raise with them the mouth of the net out of the water, and so prevent the fish escaping. The net need not and

1871

GORE v. ENGLISH FISHERIES COMMISSIONERS.

seldom does touch the bed of the river, but it is essential that its weight should rest on the boat, and this is effected by suspending the net to the poles or rames which lie over the edge of the boat. These rames are necessary, first, to distend the net and keep it open, and secondly, to jerk up the mouth of the net instantly when necessary.

This mode of fishing can only be used or adopted when the fisherman is present, and in the manner described.

The fisherman began to fish, as before described, generally from two hours before the ebb to the flood tide, and remained fishing with his boat in position, as above mentioned, from two to three hours at a time. During that period the water was generally at its lowest, and was not, in point of fact, used for the purpose of navigation, and no evidence was given that any actual obstruction to the navigation was caused by the said stop nets and boats during the time these were used for fishing purposes. The stop nets were set and used in the same spot, such spot being selected from some favourable peculiarity in the current at that place; and the reason given for their being used only immediately before low water was, that the current or tide would at other times be so strong as to sweep away the boat and cross-poles, or render it more difficult to steady and fix the boat. It was essential for the working of the net used in the above manner that the boat in which it is used should be fixed or steadied in some way.

It was admitted by the opponents of the claim that the place where the stop nets in question were used was part of a legally created and existing several fishery known "as the Crown Fishery" in the river Usk, which now belongs to the appellants.

It was contended on the part of the opponents of the appellants that the stop nets were fixed engines, and that the Court of Queen's Bench had so decided in *Holford* v. *George* (1), and that such fixed engines would be illegal, being prohibited by the statute, 2 Hen. 6, c. 15, unless they had existed before that statute.

It was contended by the appellants that the stop nets were not fixed engines, under the circumstances applicable to the spot where they were used in this fishery, and were not prohibited by the statute, 2 Hen. 6, c. 15, or any other statute, and were not within

(1) Law Rep. 3 Q. B. 639.

1871

GORE v. ENGLISH FISHERIES COMMISSIONERS.

the prohibition of the Salmon Fishery Acts; and that the owner could use as many of such engines as he pleased within any and all parts of his several fishery, where no obstruction to navigation was caused thereby.

The commissioners were of opinion that the stop nets were fixed engines within the meaning of the Salmon Fishery Acts; but, as the evidence satisfied them that the stop nets had been lawfully used before those and any other statutes which prohibited them, they decided that they were privileged fixed engines, and that the appellants were entitled to their certificate to that effect.

The question for the Court was, whether the stop nets were "fixed engines."

H. Matthews, Q.C. (*J. O. Griffits* with him) for the appellants, contended that this stop net was not a fixed engine, as it required the constant presence of human agency to keep it in its place; and even if it were kept stationary by mechanical means, it was useless for the purpose of catching fish without the presence of the fisherman.

Archibald, for the respondents, was not called upon.

BLACKBURN, J. I do not think we need trouble counsel for the respondents. The question is simply whether or not this net is a fixed engine. The 28 & 29 Vict. c. 121, s. 39, makes "fixed engine" include "any net or other implement for taking fish, fixed to the soil or made stationary in any other way, not being a fishing weir or fishing mill-dam."

That this was a net is beyond all doubt; and the question therefore is, whether this net was made stationary. It is admitted that the rames, the poles I would rather say, on which the net works, are made stationary; and it is very much, as Mr. Matthews put it, as if there were a bridge across the river, and this net had rested on the bridge. On looking at the description of this net, we find that it is of a very large size, and no human being would have power to hold it up against the tide,—a net thirty feet wide, and going a considerable distance into the water. It is rested, therefore, on the side of the boat by its own weight, and it is made stationary, for as long as the boat is stationary, it remains

1871

GORE v. ENGLISH FISHERIES COMMISSIONERS.

fixed and stands there. It is admitted if there was not anything to steady it, the net would, from the pressure of the water below, pass under the boat. Something there must be to keep it there. If it were tied with a piece of rope, it would clearly be made stationary; instead of this the fisherman stands there resting one hand to hold it steady, and it is in consequence of this pressure of the hand upon it that it is fixed, yet, notwithstanding that it is a human hand which does that, the net is made stationary, and consequently is brought within the Act. It seems to me as much stationary when the man is there as though it had been left fixed. I do not think that the mere intervention of the hand in all cases would make the thing "stationary;" but I think here, when you come to consider whether it is made stationary or not, the quantum or degree is very material. I do not think that a mere casting net, which a man throws into the water for a short time, could be called stationary. But here the net is made stationary and fixed by the man standing and keeping his hand upon it. If the net itself were stationary, and caught a fish because it was kept stationary by mechanical means, the case would be free from doubt. The present case, I think, is very near it. The net is kept there, and it is because of its being kept stationary that the fish go into it, and when the fish have gone into it, the fisherman jerks it up. But it is by means of its being stationary that the fish are caught. I think the commissioners were right, and that judgment should be for the respondents.

LUSH, J. I am of the same opinion; I think it is impossible to say that this net was not made stationary. It was not fixed to the side of the boat it is true, but if it is made stationary in any other way it comes within the Act. If these poles or rames had been tied to the boat, there cannot be a doubt that the net would have been made stationary by such mere mechanical means. But if, instead of that the tops of the poles are steadied by human agency, that is not excluded at all by the definition, and the case is equally brought within the terms of the statute.

Judgment for the respondents.

Attorney for appellants: *B. Hunt.*
Attorneys for respondents: *Solicitor to Treasury.*

BOWDITCH, APPELLANT; THE WAKEFIELD LOCAL BOARD OF HEALTH, RESPONDENTS. 1871 June 3.

Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *ss.* 2, 69—"*Owner*"—*Trustee of School not receiving and unable to receive any Rent.*

The appellant was one of three trustees to whom land had been conveyed under 4 & 5 Vict. c. 38. s. 2, for the purposes of the Act, and to permit the premises and all buildings erected thereon to be for ever used as a school for the education of poor children, and for the residence of the master and mistress, and for no other purpose whatsoever. The school, &c., was built and used according to the trust, no rent whatever being received by the trustees.

The local board gave the proper notices, for paving the street along which the school, &c., fronted, to the appellant and the owners of other premises fronting the street, under 11 & 12 Vict. c. 63, s. 69: and they charged the appellant, as "owner" of the school, the proportion according to the frontage of the school:—

Held, that the appellant was "owner" within s. 2, which enacts, that "owner" "shall mean the person for the time being receiving the rack rent of the lands or premises, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent"; and that the appellant was, therefore, liable to pay the proportion of the expenses.

CASE stated by Justices of Wakefield under 20 & 21 Vict. c. 43.

Complaint was made by the respondents against the appellant for not paying the sum of 44*l.* 6*s.*, the amount charged upon him as owner of certain premises fronting a street which had been paved, &c., under s. 69 of 11 & 12 Vict. c. 63.

By s. 2 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), it is enacted that the word "lands," and the word "premises," shall include messuages, buildings, lands, and hereditaments of any tenure; and the word "owner" shall mean the person for the time being receiving the rack rents of the land or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same if such lands or premises were let at rack rent.

By s. 69, in case any street be not sewered, paved, &c., to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, require them to sewer the same within a time to be specified in such notice, and if such notice be not com-

1871

BOWDITCH v. WAKEFIELD LOCAL BOARD.

plied with, the board may, if they shall think fit, execute the works, and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises.

The property in respect of which the respondents claim to be paid the sums set forth in the complaint consists of a building erected for and used as elementary schools for the education of the poor, in the district of St. Andrew, in the parish and borough of Wakefield, and of two dwellings erected for the teachers of the schools, and they front and abut upon the street in question.

The appellant admitted that all the proper notices had been served upon him, and it was proved that the appellant and all the owners of premises fronting, adjoining, or abutting upon the street, neglected to comply with the notices from the respondents to execute the works, and that the respondents in consequence had executed such works.

The appellant denied his liability to pay the sum charged upon him, on the ground that he was only one of three trustees, deriving no rent or other benefit from the property; that he was not owner within the meaning of the Public Health Act, 1848; that he was not receiving, and never had received, any rent whatever from the property, either on his own account or as agent or trustee, nor could receive any rent in respect of the same property, having no power to let the same; that the property could not, in fact, be let at a rent.

It was proved that the appellant held the premises subject to the trusts of a deed, which vested the property in the bishop of the diocese of Ripon, the archdeacon of Craven, and the appellant, as incumbent of the ecclesiastical district of St. Andrew, Wakefield, and their successors, to hold for the purposes of 4 & 5 Vict. c. 38, and upon trust to permit the premises and all buildings to be erected thereon to be for ever appropriated and used as a school for the education of poor persons of and in the district of St. Andrew, and for the residence of the schoolmaster or schoolmistress of the said school, and for no other purpose whatsoever; the school to be always in union with the National Society for promoting the education of the poor in the principles of the Established Church, and furtherance of its ends

and designs, and to be under the direction, &c., of a committee. The deed was of the 10th of November, 1845, and was in pursuance of 4 & 5 Vict. c. 38, and was in the form given in s. 10. (1)

The appellant contended that none of the trustees had any beneficial interest in or could let the property so as to receive rent from it.

The respondents contended that the appellant was "owner" within the definition of s. 2.

The justices ordered the appellant to pay the sum claimed.

The question for the Court was, whether or not the appellant is an "owner" within the meaning of the Public Health Act, and so liable to pay the sum ordered to be paid.

Hannay, for the appellant. The appellant is not owner of these premises within the definition in s. 2 of 11 & 12 Vict. c. 63. He is a bare trustee under 4 & 5 Vict. c. 38, s. 2, holding the land for the exclusive purpose of the school, and he neither receives the rent nor could he let the premises; for, if used for any other purpose than a school, the land would revert to the estate of the grantor.

[LUSH, J. By the subsequent Act, 21 & 22 Vict. c. 98, s. 38, churches and chapels are expressly exempt from all these charges. This is strong to shew that schools, not being mentioned, are not intended to be exempt.]

In *Eddleston* v. *Francis* (2), both Erle, C.J., and Keating, J.,

(1) By 4 & 5 Vict. c. 38, "An Act to afford further facilities for the conveyance and endowment of sites for schools," s. 2: "Any person, being seised in fee simple, fee tail, or for life, of and in any manor or lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, . . . may grant, convey, or enfranchise by way of gift, sale, or exchange, in fee simple, or for a term of years, any quantity not exceeding one acre of such land, as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge; . . . (with a proviso as to conveyance by tenant for life): Provided also, that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate held in fee simple or otherwise, or of any manor or land as aforesaid, as fully to all intents and purposes as if this Act had not been passed, anything herein contained to the contrary notwithstanding."

(2) 7 C. B. (N.S.) 568, 581, 587.

1871

BOWDITCH v. WAKEFIELD LOCAL BOARD.

express doubts as to whether a receiver appointed by the Court of Chancery could be "an owner" within the definition; and Blackburn, J., in *Angell* v. *Paddington* (1), thought the commissioners for building additional churches would not be "owners" within s. 250 of 18 & 19 Vict. c. 120, which defines "owner" in the same terms as s. 2 of the present Act.

Milward, Q.C. (*Wills* with him), for the respondent. A trustee must be the owner for whatever purpose he holds the land, unless the purpose makes the premises exempt from rates, &c. There is no exemption of schools in these Acts.

Hannay, in reply.

BLACKBURN, J. I am of opinion that our judgment must be for the respondents. These expenses, under s. 69, are to be paid by the "owners," according to the frontage of their premises. These premises are fronting this street; and no doubt a trustee is an "owner" in the ordinary acceptation of the term. The definition of "owner," however, in s. 2 [the learned judge read the section], does not say "owner" shall include, but shall mean. Now, though these premises are and must be held as schools, and cannot be let for any purpose, yet, if they were let, the rent would come to the appellant. I think, therefore, he is "owner" within the meaning of the definition. There is no apparent reason why a trustee of these schools should not be within the Act; and as to the difficulty of the appellant getting recouped, those who undertake trusts do often incur liability, and must have recourse to such measures as are open to them. The decision in the case of *Angell* v. *Paddington* (2), proceeded on the peculiar language of the statutes there in question; here, "lands" and "premises" include every description of property, and there is no exemption in favour of any class.

MELLOR, J. I am of the same opinion. The owners of premises fronting the street are to pay the expenses, and premises includes every description of property, without any exception in s. 69; and the only exception is as to rates, in s. 88, by which local exceptions of any kind of property are to be observed. Then, in the second Act (s. 38), there is a special exemption from all liability to expenses

(1) Law Rep. 3 Q. B. at p. 718. (2) Law Rep. 3 Q. B. 714.

under s. 69 in respect of churches and chapels. Therefore it is clear that the legislature, having this question before them, did not think fit to exempt schools; and the owner, that is, the trustee, is liable in the same way as any other trustee to these expenses.

LUSH, J. I am of the same opinion. The case of *Angell* v. *Paddington* (1) proceeded on statutes which are very differently worded—"owners of houses" in the first statute, and "owners of land" in the second; and we came to the conclusion that a church did not come within either term.

Judgment for the respondents.

Attorneys for appellant: *H. A. Maude.*

Attorneys for respondents: *Clarke & Son, for Barrett, Wakefield.*

(1) Law Rep. 3 Q. B. 714.

1871
June 15.

THE QUEEN ON THE PROSECUTION OF THOMAS FLIGHT *v.* THE VESTRY OF ST. LUKE'S, CHELSEA.

Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 68, *Effect of, to give Compensation—Construction of Special Act consolidating Lands Clauses Consolidation Act.*

Where the entire Lands Clauses Consolidation Act, 1845, is incorporated in a special Act, no other enactment is required, beyond s. 68, to confer the right to compensation for lands injuriously affected by the works under the special Act.

Ferrar v. *London Commissioners of Sewers* (Law Rep. 4 Ex. 1), on this point, approved.

By the Chelsea Improvement Act, 1845, s. 83, "so much of the Lands Clauses Consolidation Act, 1845, as is applicable, and is not modified by this Act, or as is not inconsistent with the provisions hereof, shall apply to the improvements authorized by this Act to be made, and shall be read as forming part of this Act." By s. 104 the commissioners under the Act may alter the level of streets, nothing being said as to compensation. By ss. 124 and 127 the commissioners may remove from houses projections into the streets which were existing at the passing of the Act, and also, on the rebuilding of projecting houses, set them back to the line of the street, with a proviso that the commissioners shall make compensation to the owner, &c., in either case.

The commissioners, by raising the level of a street under s. 104, impeded the access to a house, and so injuriously affected it:—

Held, that the lessee of the house was entitled to compensation under s. 68 of the Lands Clauses Consolidation Act; and that the fact of compensation being expressly given in cases under ss. 124 and 127 of the local Act was not inconsistent with the intention that it should be given in cases within s. 104 by virtue of the general enactment in s. 68 of the Lands Clauses Consolidation Act.

A MANDAMUS having issued commanding the defendants to take up an award alleged to have been made under the Chelsea Improvement Act, 1845 (8 & 9 Vict. c. cxliii.), and the Acts incorporated therewith, the defendants made a return; and a case was thereupon stated for the opinion of the Court, of which the following is the substance:—

The prosecutor is the lessee of a house and blacksmith's shop and shoeing shop; the defendants, under the powers of the above Act (s. 104), and the powers vested in them by the Metropolis Management Acts, 1855 and 1862, in 1867 caused the level of the footway in the street in which the prosecutor's premises were situate to be raised; the consequence of which was to impede the access to the shop, and so to materially damage and injuriously affect the value of the premises.

By s. 83 the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), is consolidated with the local Act; and the prosecutor gave the defendants notice of his claim to compensation, and of the appointment of an arbitrator on his behalf. The defendants denied their liability to pay compensation, and refused to appoint an arbitrator, or to attend before the prosecutor's arbitrator, upon which the arbitrator proceeded ex parte, and made an award.

The question for the Court was, whether the prosecutor is entitled to compensation from the defendants, or not.

June 3. *Philbrick* (*H. T. Atkinson* with him), for the prosecutor. *Sir J. B. Karslake, Q.C.*, for the defendants.

The arguments and sections of the Acts relied on are fully noticed in the judgment.

Cur. adv. vult.

June 15. The judgment of the Court (Blackburn, Mellor, and Lush, JJ.) was delivered by

LUSH, J. There can be no doubt, upon the statements in the case, that the prosecutor's property has been injured, and depreciated in value, by the acts of the defendants in raising the level of the street so as to impede the access to the premises, and that this was done under the authority of s. 104 of the local Act, 8 & 9 Vict. c. cxliii. (1) The prosecutor has therefore sustained damage, for which he is deprived of the remedy by action which he would otherwise have had; and the question is, whether he is not entitled to compensation, to be recovered in the manner prescribed by the Lands Clauses Consolidation Act (8 Vict. c. 18).

It is contended that he is not so entitled, for three reasons: 1. Because the Lands Clauses Act is only partially incorporated into and applied to the provisions of the local Act. 2. Because, supposing the 68th section to be introduced, it does not confer the right to compensation, but only provides the machinery for recovering it in cases where it is otherwise given. 3. Because there are

(1) 8 & 9 Vict. c. cxliii. s. 104: "It shall be lawful for the commissioners at any time, and from time to time, subject, nevertheless, to the provisions in this Act contained, to alter the level of any street now or hereafter to be formed, laid out, or made, in such manner and form as the commissioners shall think expedient."

1871

THE QUEEN v. ST. LUKE'S.

provisions in the local Act which modify the 68th section, and are inconsistent with its application to such a case as the present.

The section of the local Act which incorporates the Lands Clauses Act is the 83rd. The preceding eighty-two sections relate to the establishment and constitution of the board, their mode of proceeding, and powers of borrowing and rating. Then come the sections which define the powers of the commissioners for "better paving, lighting, cleansing, regulating, and improving the parish of St. Luke's, Chelsea;" and in its appropriate place, at the head of these sections, stands the clause in question. It enacts, that "so much of the Lands Clauses Consolidation Act, 1845, as is applicable to, and is not modified by, this Act, or as is not inconsistent with the provisions hereof, shall be held to apply to the improvements by this Act authorized to be made, and shall be read and construed as forming part of this Act." The argument in support of the first point was, that inasmuch as the section (1) which immediately follows the 83rd provides for taking lands for the purpose of making, widening, and improving streets, and as this was one of the principal objects of the Act, the word "improvements" must be read as applying to these alterations only, and consequently only so much of the Lands Clauses Act is incorporated as relates to the taking of lands. We are satisfied that the 83rd section has no such limited application. The raising and lowering the level of existing streets is as much an "improvement" as the making a new street; and the word is used throughout the Act as applying as well to one class of alterations as another.

The second point has been already decided by the Court of Exchequer in *Ferrar* v. *London Commissioners of Sewers* (2), and

(1) 8 & 9 Vict. c. cxliii. s. 84: "Subject to the provisions of this Act it shall be lawful for the commissioners to contract for, and agree with the owners of, lands particularized in schedule (C), for the absolute purchase for a consideration in money of such lands, or such parts thereof as they shall think fit and proper, and of all subsisting leases therein, and of all rent-charges, annuities, mortgages, or incumbrances affecting any such lands, and all other estates, rights, or interests in such lands of what kind soever, and to enter into and take the same for the purpose of making, widening, or otherwise improving streets within the said parish, and the commissioners are hereby empowered to make, widen, and improve such streets as they from time to time shall deem fit and necessary." . . .

(2) Law Rep. 4 Ex. 1.

1871

THE QUEEN v. ST. LUKE'S.

we should have been content with saying that we held ourselves bound by that decision, were it not for the intimation given in the Exchequer Chamber, when reversing the judgment of the Court below on another point, that this point was one which, had it been necessary to decide it, would have required further consideration. (1)

We have therefore considered it, and we entirely agree with the Court of Exchequer that, where the entire Act is incorporated, as it is here, no other enactment is needed in order to confer the right to compensation for lands injuriously affected.

The 68th section enacts, that "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled by arbitration, or by the verdict of a jury, as he shall think fit;" &c. In connection with this section must be read the 22nd, to which the 68th is evidently supplementary. The language of s. 22 is: "If no agreement be come to between the promoters of the undertaking and the owners or parties by this Act enabled to sell and convey or release any lands taken or required for or *injuriously affected* by the execution of the undertaking, or any interest in such lands, as to the value of such lands or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed 50*l.*, the same shall be settled by two justices." These are the only sections in the Lands Clauses Act which bear upon the present question; and if they are not sufficient, there is nothing in the local Act which enlarges their scope and meaning.

The Lands Clauses Act was designed to be a code for defining the rights and remedies of persons whose lands should be taken or injured by works to be thereafter authorized, and the intention of the legislature is apparent, that wherever that Act should be incorporated without qualification or exception into a local Act, it should be a code complete in itself. For its object is expressed in the

(1) See Law Rep. 4 Ex. at pp. 230-1.

1871

THE QUEEN v. ST. LUKE'S.

preamble to be, "to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for insuring greater uniformity in the provisions themselves." And the first section enacts that, "this Act shall apply to every undertaking authorized by any Act, which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertakings authorized thereby, so far as the same shall be applicable to such undertaking, and shall form part of such Act, and be construed together therewith as forming one Act."

It is true that the Act does not say in terms, like the Railways Clauses Consolidation Act (8 Vict. c. 20, s. 6), that the compensation shall be given for lands *injuriously affected*, but such intention is clearly implied. To hold otherwise would be to say that the Act gives the remedy without the right, and that the 22nd and 68th clauses are useless so far as they relate to lands injuriously affected.

Then is there anything in the private Act which modifies or is inconsistent with this provision? We can see nothing. The 124th and 127th sections (1), which expressly give compensation, the

(1) 8 & 9 Vict. c. cxliii. s. 124: "And with regard to all obstructions or projections of a like kind as those before mentioned which have been erected or placed against or in front of any house or other building in any street or public place before the passing of this Act, it shall be lawful for the commissioners, if they shall consider any such obstruction or projection to be an annoyance, in consequence of the same projecting into, endangering, or rendering less commodious the passage along any street within the limits of this Act, to cause the same to be removed or altered, as they shall think fit: Provided always, that the commissioners shall give notice in writing of such intended removal or alteration to the owner and occupier against or in front of whose house or building such obstruction or projection shall be twenty-one days before such alteration or removal shall be commenced, and shall make reasonable compensation to every person who shall incur any loss or damage by such removal or alteration."

S. 127: "When any house or building, any part of which projects beyond the regular line of the street, or beyond

one where projections made before the passing of the Act are ordered to be removed, and the other where a house taken down to be rebuilt is ordered to be set back to the line of street, have been appealed to as examples illustrating the maxim, "Expressio unius exclusio alterius."

It may probably have been supposed by the framers of the Act (and it may well be open to doubt) that the 68th section of the Lands Clauses Act (which had then recently passed) would not have applied to all cases where the building was set back under s. 127, or to any cases of removal under s. 124; and this may account for their giving compensation in these cases by express words. The fact that compensation is given in such cases as are here enumerated, so far from being inconsistent with the view we take of s. 68, appears to us to be rather confirmatory of it. For we cannot suppose that it was intended to compensate in such cases as these, and to leave without redress cases where the access to houses had been injuriously interfered with, and the property permanently deteriorated by, the raising or lowering of the streets on which they abutted.

Our judgment is therefore for the prosecutor.

Judgment for the Crown.

Attorneys for prosecutor: *Batt & Son.*
Attorneys for defendants: *Lee, Pemberton, & Lewis.*

---

the front of the house or building on either side thereof in any street within the limits of this Act, shall be taken down to be rebuilt or altered, the same shall be set back to the line of the street, or the line of the adjoining house or building, in such manner as the commissioners shall direct for the improvement of such street, and when the next house or building shall not adjoin the house or building to be so taken down, but shall be separated therefrom, then the same shall be set back to the line of such street: Provided always, that the commissioners shall make full compensation to any such owner for any loss or damage he may sustain in consequence of his house being set back according to the provisions herein contained."

1871
July 6.

MASON *v.* THE SHREWSBURY AND HEREFORD RAILWAY COMPANY.

Easement—Watercourse—Rights of servient Owner as against dominant Owner—Prescription Act (2 & 3 *Wm.* 4, *c.* 71), *s.* 2—*Enjoyment*, "*as of right.*"

Before 1800, a canal company, under powers of an Act of Parliament, diverted for the purposes of the canal a considerable part of the water from a brook, which flowed through the plaintiff's land, at a point above the plaintiff's land, the rest of the water continuing to flow in its natural channel. In 1847 an Act was passed authorizing the defendants, a railway company, to purchase the canal, to discontinue the use of it, and to fill it up, and sell such parts as were not used for the railway. Under these powers the use of the canal was discontinued in 1853; and in 1864 the defendants made a cut by which they restored to the brook at a point above the plaintiff's land the water which had been diverted from it. In 1865 the defendants conveyed the part of the canal on which they had made the cut to a purchaser in fee. The bed of the stream, owing to the diminished scour of the water from 1800 to 1853, had been silted up, so as to be insufficient to carry off the water coming down in extraordinary floods. In 1866 such a flood occurred; the water overflowed the plaintiff's land and damaged his crops; upon which he brought an action against the defendants:—

Held, that, there being no obligation imposed upon the canal company to continue the diversion, the plaintiff had no right of action:

By Blackburn and Hannen, JJ.: On the ground that, though the claim to have the water, which would otherwise have come down to the plaintiff's land, diverted over other land was a claim to a watercourse within the Prescription Act (2 & 3 Wm. 4, c. 71), s. 2, yet the enjoyment was not as of right, and therefore, though for more than forty years, conferred no right on the plaintiff.

By Cockburn, C.J.: On the ground that the plaintiff, the owner of the servient tenement, could acquire, by the mere existence of the easement, no right as against the owner of the dominant tenement to the continuance of the diversion.

Quære, by Blackburn and Hannen, JJ., whether such a right could be acquired under the Prescription Act against a canal company.

Semble, by the same judges, on the authority of *Roswell* v. *Prior* (12 Mod. 635), that the fact of the defendants having parted with the property would not have affected their liability.

ACTION, commenced in 1868, to recover damages for injuries done to plaintiff by defendants having caused certain lands in occupation of plaintiff to be flooded; and for disturbance of an easement claimed by plaintiff of having the water of a brook, called Ashton Brook, conveyed away from his lands along a canal of defendants.

1871

MASON v. SHREWSBURY AND HEREFORD RAILWAY CO.

Pleas, inter alia, not guilty; a justification under certain local Acts; and an easement of diverting waters from defendants' canal into the brook.

At the trial before Keating, J., at the Hereford Spring Assizes, 1869, a verdict was taken for the plaintiff, subject to a case.

The case was very voluminous, but the material facts and reference to the sections of the local statutes are given in the judgment of Blackburn, J.

The question for the Court was whether the defendants had committed any actionable wrong for which the plaintiff could maintain this action, and which is not justified by the defendants.

April 21. *Harington*, for the plaintiff, cited *Magor* v. *Chadwick* (1); *Arkwright* v. *Gell* (2); *Sutcliffe* v. *Booth* (3); *Ivimey* v. *Stocker* (4); *Lawrence* v. *Great Northern Ry. Co.* (5); *Roswell* v. *Prior* (6); *Thompson* v. *Gibson* (7); *Backhouse* v. *Bonomi.* (8)

Manisty, Q.C. (*J. O. Griffits* with him), for the defendants, cited *Gaved* v. *Martyn* (9); *National Manure Co.* v. *Donald* (10); *Staffordshire Canal* v. *Birmingham Canal* (11); *Gandy* v. *Jubber* (12).

The arguments are sufficiently noticed in the judgments.

Cur. adv. vult.

July 6. The following judgments were delivered:—

BLACKBURN, J. This is a special case. The substance of it is that the plaintiff is the occupier of lands lying beside a natural watercourse called the Ashton Brook. The Leominster canal was formed by a company under the provisions of an Act of Parliament, 31 Geo. 3, c. lxix. It crossed the Ashton Brook above the lands now in the occupation of the plaintiff. The canal company having the powers usually conferred for that purpose in Canal

(1) 11 Ad. & E. 571.
(2) 5 M. & W. 203.
(3) 32 L. J. (Q.B.) 136.
(4) Law Rep. 1 Ch. Ap. 396.
(5) 16 Q. B. 643.
(6) 12 Mod. 635.
(7) 7 M. & W. 456.
(8) 9 H. L. C. 503; 34 L. J. (Q.B.) 181.
(9) 19 C. B. (N.S.) 732; 34 L. J. (C.P.) 353.
(10) 4 H. & N. 8; 28 L. J. (Ex.) 185.
(11) Law Rep. 1 H. L. 254.
(12) 5 B. & S. 485.

1871

MASON v. SHREWSBURY AND HEREFORD RAILWAY CO.

Acts (1), diverted the greater part of the waters of the Ashton Brook at a point still higher up its course into a feeder, by which they supplied their canal, and the water thus brought into the canal passed over it, and never came to the land now the plaintiff's. The residue of the waters of the Ashton Brook passed down the watercourse and under the canal to the plaintiff's land, but the quantity of the water was much diminished.

All this was done before the year 1800, and this state of things continued until the year 1847, when the statute 10 & 11 Vict. c. cclxvi. was passed, authorizing (s. 4) the sale of the canal to the Shrewsbury and Hereford Railway Company, the now defendants (2); and by ss. 14 and 15, giving the railway company, after the purchase, power to discontinue the use of the canal as a canal, to fill it or any part of it up, and to sell any part of it. These powers were permissive only, not obligatory.

In the year 1853 the use of the canal as a canal was discontinued. This was more than forty years after the waters of the Ashton Brook were diverted as above stated, and less than twenty years before the commencement of the present action.

The railway company then proceeded to fill up and sell various parts of the canal; and, in 1864, made a cut in the canal, so as to let the waters out of the canal into the ancient course of the Ashton Brook above the plaintiff's land. The effect of this was, that the portion of the waters of the Ashton Brook which, since 1800, had flowed down the feeder into the canal, and thence passed away without coming to the plaintiff's land, now flowed down the feeder into what had been the canal, and along it into the natural watercourse above the plaintiff's land. And thus the same waters which, before the canal was made, flowed down to the plaintiff's land, now again flowed down to it after passing through a circuitous course above it; and, as far as the plaintiff was concerned, the same effect was produced as if the dam by which the waters were diverted into the feeder had been removed, and the waters of the brook allowed to flow as they had done before the canal was made. Some additional water was brought into the brook in consequence

(1) See 31 Geo. 3, c. lxix. s. 1.

(2) By s. 10, All the powers, rights, privileges, provisions, &c., vested in the canal company under the former Act are to vest in the defendants.

of the drainage along the canal; but this additional water, as is stated in pars. 51 and 62 of the case, was not considerable, and did not occasion any damage; and may therefore be disregarded.

There are a great many unnecessary details stated in the case, and marked upon the plan, but I believe that what I have above stated is all that is material.

The railway company having made this cut, sold the portion of the canal where it was with the cut upon it, and in December, 1865, conveyed it to the purchaser in fee.

No mischief, or at least no mischief that was complained of, occurred till 1866, after the conveyance by the defendants, when a flood injured the plaintiff's crops. It was then discovered that the watercourse below the plaintiff's land had, during the long period in which the waters were diminished, become by natural causes silted up so as to be no longer adequate to carry off the flood-water of the Ashton Brook in its old natural state; and that this had occasioned the damage to the plaintiff.

Two points were made on behalf of the defendants. First, that there had been no wrong at all committed against the plaintiff, inasmuch as he had never acquired any legal right to have any part of the waters of the Ashton Brook kept diverted so as not to flow down to his land as it used to do before the canal was made. Secondly, that the action, if any, should have been brought against the persons who were owners and occupiers of the cut at the time the flood occurred, and not against the defendants. The first is the more important of the two.

The occupiers of the land lower down the Ashton Brook than the canal would naturally suppose things were going to remain in the state in which they had been for so many years, and can in no way be blamed for not anticipating that the canal would be disused, and the waters which had been diverted again turned into the brook; and after that state of things had continued for more than forty years, one would wish to find some legal ground for saying that they had acquired a legal right to prevent this long continued state of things from being altered to their prejudice. But I feel obliged to come to the conclusion that there is no ground on which such a right can be supported.

Before the canal was made, the person whose estate the plaintiff

1871

MASON v. SHREWSBURY AND HEREFORD RAILWAY CO.

now has had the ordinary rights and liabilities of a riparian owner on the banks of a natural stream. He was entitled to have the water flow to him in its natural state, so far as that was a benefit, as, for instance, to turn his mill or water his cattle; and he was bound to submit to receive the water, so far as it was a nuisance, as by its tendency to flood his lands. The Canal Act to some extent interfered with this state of things. It gave (by s. 1) the canal company power to take water from all brooks, &c., within 200 yards of the canal for supplying the canal with water, and for that purpose to make feeders, set up engines, &c. And there are clauses (1) under which they are compelled to make compensation for so taking the water, so far as it was a beneficial property. But there is nothing in the Act to authorize them to take water for any but canal purposes. Neither is there anything that I can find in the Act which can be construed as imposing an obligation on the canal company to continue to take the water which they had diverted any longer than they found it convenient so to do. In the case which the Act contemplates, of their erecting an engine to pump up the water from a brook, it would require very clear language to make me believe that the legislature intended to oblige them to continue using that engine for the benefit of the persons on the banks of the brook below, after they had discovered that they could get their water cheaper somewhere else. And it seems to me that the same reason applies, though not so obviously, against implying any obligation on them to keep up a dam and a feeder for the purpose of continuing the diversion of the water into the canal when it was no longer required for canal purposes. It would rather seem to follow, from the decision in *National Manure Co.* v. *Donald* (2), that as soon as the canal company ceased to use the waters for the purposes authorized by their Act, the riparian owners below had a right to insist that the water should be allowed to flow in its old natural course for their benefit; but however that may be, it seems to me clear that (at least at any time within twenty years after the water was diverted) the canal company might discontinue taking it, if they got a sufficient supply from another source, for there is nothing in the Canal Act to compel them to continue taking it. Then comes the question, whether the enjoyment de facto of the

(1) Sects. 13, 15, 16.

(2) 4 H. & N. 8; 28 L. J. (Ex.) 185.

relief from this water for more than forty years gives a legal right to the continuation of that relief. That is a question depending on the construction of the Prescription Act, 2 & 3 Wm. 4, c. 71. The 2nd section of that Act provides that no claim which may be lawfully made at the common law inter alia by "grant" inter alia "to any watercourse or the use of any water" over the lands of another, where such matter "shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years," shall be destroyed only by shewing its commencement; "and where such way or other matter shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

I think the present claim to have the water which would otherwise have flowed down to the plaintiff's land diverted over other land, so as no longer to come to it, is a claim to a watercourse, and that it is one which might be created by a grant, if the owner of the servient tenement was a common person. A doubt is raised by the *National Manure Co.* v. *Donald* (1), whether a canal company incorporated by Act of Parliament for a particular purpose is capable of either giving or accepting a grant, except for the statutable purposes, and consequently whether there can be a title acquired under the Prescription Act against such a company. If it were necessary to decide either way upon that point, I should desire further time for consideration. The reason why I think that in the present case no right is acquired under the Prescription Act is, that I think the watercourse cannot be properly said to have been enjoyed by a person *claiming right thereto* within the meaning of that Act. I do not think the Canal Act can properly be used as shewing that the enjoyment was by "consent or agreement expressly given or made for that purpose by deed or writing," for though the statute is undoubtedly in writing, I think it would be straining language to say that the obedience compelled by the legislature was consent or agreement. But I think the Canal Act does conclusively shew what was the nature of the user, and if that

(1) 4 H. & N. 8; 28 L. J. (Ex.) 185.

1871

MASON v. SHREWSBURY AND HEREFORD RAILWAY CO.

is not such as to amount to an enjoyment as of right, the claim cannot be supported under the Prescription Act. The judgment of the Court of Exchequer in *Wood* v. *Waud* (1) seems to me to lay down the principle applicable to this case. There were several questions there brought before the Court. One was, whether the plaintiffs had a cause of action against the defendants for diverting the waters of two artificial watercourses. The facts appeared to be that those watercourses had been formed for the purpose of draining some coal pits. The water had continued to flow for more than sixty years across part of the defendants' land, and then across the plaintiffs'; and there seems no doubt that the colliery owners had acquired a right to discharge the water on the defendants' land as long as they pleased, and the defendants had also acquired a right to discharge the water thus brought on their land on to the plaintiffs'. But the Court of Exchequer decided, following their previous decision in *Arkwright* v. *Gell* (2), that inasmuch as it was obvious that the coal owners only discharged the waters for the purpose of getting rid of it, and therefore only for a temporary purpose, there was no enjoyment as a matter of right in that water as against the coal owners. And they followed this up much further, for they held that, inasmuch as a proprietor of land below had acquired no right to require the coal owners to continue to allow the water to flow for his benefit, so he had acquired no right as against the owners of the intermediate land to continue to allow the water which in fact flowed from the coal pits to flow as it had done. "He has no right," they say, "to compel the owners above to permit the water to flow through their land for his benefit; and consequently has no right of action if they refuse to do so." (3)

I think this is in effect a decision that an active enjoyment in fact for more than the statutable period is not an enjoyment as of right, if during the period it is known that it is only permitted so long as some particular purpose was served. It is in exact conformity with the Civil Law, the enjoyment must be "nec clam, nec vi, nec precario." In that case the nature of the sough shewed that though the water in fact had flowed for sixty years, yet from

(1) 3 Ex. 748; 18 L. J. (Ex.) 305.
(2) 5 M. & W. 203, 231.
(3) 3 Ex. at p. 779; 18 L. J. (Ex.) at p. 314.

the beginning it was only intended to flow so long as the coal owners did not think fit otherwise to drain their mines, and so was precarious. In this case the provisions of the Canal Act shew that, though the water has been in fact diverted for more than forty years, yet from the beginning it was only diverted so long as it might be wanted for the purposes of the canal, and so was precarious.

I have based my reasoning principally upon the provisions of the Canal Act, which seem to me to leave the company at liberty to change their sources of supply whilst they still keep up the canal; but I think also that the possibility that the canal itself might be discontinued is by no means to be lost sight of. It is true that, if the canal company had discontinued it without the authority of Parliament, there might have been steps taken on behalf of the public to compel them to keep it up. I do not mean to express any opinion as to whether those steps would have been successful or not. But I take it to be clear that no steps could have been taken by the plaintiff as a riparian proprietor for such a purpose. He would but be one of the general public having no peculiar locus standi. And though an Act to enable a statutable corporation to give up business is not a thing that occurs often, I think the riparian proprietors ought to have known it was possible.

As to the second question, it is not necessary, in my view, to form an opinion. I must own, however, that I do not see how to distinguish the present case from *Roswell* v. *Prior*. (1)

HANNEN, J. I concur in the judgment which has been delivered by my Brother Blackburn, with an unimportant exception. I do not think that the possibility that the canal might be discontinued ought to be considered. The discontinuance could only be by legislative authority, and I think that the riparian owners had a right to assume, and to act upon the supposition, that the canal would be maintained. This consideration, however, does not affect the judgment, but I think it right to express my opinion upon that particular point.

COCKBURN, C.J. The facts of this case are so fully and clearly set forth in the judgment just read by my Brother Blackburn that

(1) 12 Mod. 635.

1871

MASON v. SHREWSBURY AND HEREFORD RAILWAY CO.

it appears to me unnecessary to go over them again in detail; the more so, as, for the purpose of my own judgment, they may be stated in a few words.

The plaintiff is the owner of lands to which a stream called the "Ashton Brook" flows in its natural course. Shortly before the commencement of the present century a canal company obtained power by an Act of Parliament to divert, and under that power did in fact divert, at a point in the course of the stream above the plaintiff's land, the greater part of the water, while the rest continued to flow in its natural channel. In 1847 the defendants, a railway company, being empowered by Act of Parliament, purchased the canal; and being likewise authorized by the Act to discontinue the use of the canal, and to fill up and sell the bed, they, in 1853, exercised the power thus given, discontinued the use of the canal, discharged the water into the Ashton Brook, and adopted measures whereby the water diverted from the brook was again returned to it at a point above the plaintiff's land. The effect of this was to restore the flow of the water, so far as the plaintiff was concerned, to its pristine condition, with one important exception—the bed of the stream had, owing to the diminished scour of the water during so many years, become partially silted up, so as to be insufficient to carry off, not indeed the water ordinarily flowing down it, but the water coming down in times of extraordinary flood. In 1866 such a flood occurred; the water overflowed the plaintiff's land, and did damage to his crops; and in respect of the damage thus done this action is brought.

The question is, whether, under these circumstances, the plaintiff is entitled to recover. I agree with my learned Brothers in thinking that he is not. I differ from them in thinking that the question, whether the plaintiff has acquired any right as against the defendants, turns on the Prescription Act (2 & 3 Wm. 4, c. 71) alone. It appears to me to depend on a principle of the law relating to easements, which would have been equally applicable if the Act in question had never been passed.

The right of diverting water which in its natural course would flow over or along the land of a riparian owner, and of conveying it to the land of the party diverting it, the servitus aquæ ducendæ of the civilians, is an easement well known to the law of this as of

every other country. Ordinarily such an easement can be created, according to the law of England, only by grant, or by long continued enjoyment, from which the existence of a former grant may be reasonably presumed. But such a right may, like any other right, be created in derogation of a prior right by the action of the legislature. It was thus created in the present instance. But, however it may be called into existence, the right is essentially the same. The legal incidents connected with it are the same, whether the easement is created by grant or by statutory enactment. Now, it is of the essence of such an easement that it exists for the benefit of the dominant tenement alone. Being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner. Like any other right, its exercise may be discontinued, if it becomes onerous, or ceases to be beneficial, to the party entitled. An easement like the present, while it subjects the owner of the servient tenement to disadvantage by taking from him the use of the water, for the watering of his cattle, the irrigation of his land, the turning of his mill, or other beneficial use to which water may be applied, may, on the other hand, no doubt, be attended incidentally with equal or greater advantage to him, as, for instance, by rendering him safe from the danger of inundation. But this will give him no right to insist on the exercise of the easement on the part of the dominant owner, if the latter finds it expedient to abandon his right. In like manner, where the easement consists in the right to discharge water over the land of another, though the water may be advantageous to the servient tenement, the owner of the latter cannot acquire a right to have it discharged on to his land, if the dominant owner chooses to send the water elsewhere, or to apply it to another purpose. And upon this principle, as it appears to me, might the case of *Wood* v. *Waud* (1) have been decided without reference to the Prescription Act (2 & 3 Wm. 4, c. 71), or to the question as to whether there had been an enjoyment "as of right," so as to satisfy that statute. I prefer to rest my judgment on the principle—as it appears to me, a fundamental one—that an easement exists for the benefit of the dominant owner alone, and that the servient owner acquires

(1) 3 Ex. 748; 18 L. J. (Ex.) 305.

1871

MASON v. SHREWSBURY AND HEREFORD RAILWAY CO.

no right to insist on its continuance, or to ask for damages on its abandonment.

I am far from saying that the grant of an easement might not be accompanied by stipulations on the part of the grantor; as, for instance, that the easement should not be discontinued without his consent, or that on its discontinuance certain things should be done. I am far from saying that such a stipulation would not give a right of action. My observations are intended to apply to a case in which nothing appears beyond the existence of an easement. In such a case, it appears to me beyond doubt that the servient owner acquires no right to the continuance of the easement and the incidental advantages arising to him from it, if the dominant owner thinks proper to abandon it.

If, in the present case, the Canal Act had made it incumbent on the company to continue the use of the canal, or had attached any specific obligations to the contingency of its disuse, the case would have been different. But nothing of the sort is to be found in the Act. The powers conferred by it are permissive; no conditions are attached to the discontinuance of the canal; the company acquire the right to take the water, without more. The exercise of the right is not compulsory. The company may abandon its exercise if they choose. I am at a loss to see how, under such circumstances, the plaintiff, in derogation of whose prior right the right of the company was given, can be said to have acquired a right to insist on the continuance of the easement.

The defendants, having been authorized to abandon the use of the canal and having in fact abandoned it, had, as it seems to me, no alternative but to allow the water to flow, undiminished in quantity, down the brook, in its natural course to the plaintiff's land. Their right to take the water being limited to taking it for the use of the canal, they could not have taken it for a different purpose, or so as to allow it to run to waste. So soon as they discontinued the use of the canal, their right to take the water ceased, and the plaintiff and the riparian owners lower down the stream again became entitled to have the whole of the water descend to them in its natural course; and, if the defendants had continued to divert the water, would have had legal ground of complaint and action; while the defendants could not have justified, inasmuch as they could

not have alleged that the water was taken for the purpose of feeding and maintaining the canal. It appears to me, therefore, quite clear that the defendants were right in restoring the water to its natural quantity before it reached the land of the plaintiff.

It is true that the proximate cause of the damage complained of, namely, the silting up of the channel, so as to render it less capable of carrying off the water at a time of flood, was brought about by the act of the defendants in diverting the water of the brook. But as this was the natural and necessary consequence of the diversion of the water, as authorized by Act of Parliament, it follows that this result cannot be imputed to the defendants as wrongful. If it be said that, having brought about this result, it was incumbent on them to have recourse to some engineering contrivance to prevent any damage in times of flood, or to restore the channel of the stream to its original condition, the general reasoning I have before set forth in respect of the obligations of a dominant owner apply, as shewing that no such duty was cast on the defendants either by the local Act or by implication of law. In addition to which, as regards the restoration of the channel, it may be further observed that the defendants could not have entered on to the plaintiff's land, for the purpose either of ascertaining the condition of the channel or of restoring it, except by the leave and licence of the plaintiff. No such leave and licence was ever given. Far from calling on the defendants to repair the bed of the stream, the plaintiff acquiesced in the existing state of things from the year 1853, when the change took place, till 1866, when an extraordinary flood caused the overflow of the stream. Till that time neither he nor any one else appears to have entertained any doubt of the capacity of the channel to carry off the water at all times. The defendants, therefore, were not only not called upon to do anything to the channel, but would not have been justified in doing so.

The result is that the plaintiff is not entitled to recover, and that our judgment must be for the defendants.

Judgment for the defendants.

Attorney for plaintiff: *T. Fortune, for Humfrys & Son, Hereford.*
Attorneys for defendants: *Young, Maples, & Co.*

1871
May 26.

MUSGRAVE AND OTHERS *v.* FORSTER AND ANOTHER.

Commons, Inclosure of—Game—Allotment to Commoners reserving the Right to the Game to the Lord—Provisional Order, sufficiency of—Inclosure Acts. (8 & 9 *Vict. c.* 118, *s.* 27; 11 & 12 *Vict. c.* 99, *s.* 1).

The Inclosure Commissioners, under 11 & 12 Vict. c. 99, s. 1, which empowers them to set forth, in their provisional order, any special agreement or matter concerning or affecting the lands to be inclosed, and to make the same a condition of such inclosure, are authorized to make it a condition of the inclosure of a waste that the right of sporting shall be severed from the soil, and the tenement thus created shall remain in the lord, whilst the soil is allotted to others.

The intention to impose such a condition is sufficiently manifested by a clause in the provisional order:—"That one-sixteenth part in value of the lands be allotted to the lords of the manor in lieu of their right and interest in the soil of the lands, exclusively of their right and interest in the game, and in all mines, minerals, stone, and other substrata under the lands."

CASE stated by consent without pleadings.

1. At the time of the making of the provisional order and of the inclosure thereunder as hereafter mentioned, the plaintiffs (trustees under the will of Lord Wallace, then deceased) were lords of the manor of Knaresdale, and as such lords were entitled to the soil of certain lands within the manor called "Knaresdale Common," such lands then being lands subject to be inclosed under the provisions of "the Acts for the inclosure, exchange, and improvement of land."

2. On the 25th of August, 1852, a provisional order was made by the Inclosure Commissioners, which contained, amongst other terms, the following, "That one-sixteenth part in value of the lands be allotted to the lords of the manor in lieu of their right and interest in the soil of the lands, exclusively of their right and interest in the game, and in all mines, minerals, stone, and other substrata in and under the said lands."

3. By 16 & 17 Vict. c. 120, it was enacted that the proposed inclosure of Knaresdale Common should be proceeded with.

4. The inclosure of the lands was accordingly proceeded with, and an award was made according to the provisions of the Acts.

5. By the award the valuer set out, allotted, and awarded unto the lords of the manor certain lands therein specified, and then proceeded thus:—"Which I adjudge and declare to be equal in

value to one-sixteenth part of the residue of the lands to be inclosed, and to be in lieu and in full compensation for the right and interest of the said lords of the manor in the soil of the said lands, exclusively of his right and interest in the game, and in all mines, minerals, stone, and other substrata under the same." And after allotting and awarding the residue of the lands to be inclosed, the valuer by his award proceeded to award and declare as follows:—"And I further declare that I do on the request in writing of the lord of the manor reserve and set out to the said lord all game, mines, minerals, stone, and other substrata under the lands to be inclosed, with full power and authority for him, his heirs, lessees, and assigns, and his and their agents, miners, and servants, at all times hereafter to enter upon all or any part of the said land, to hunt and take all game, and to search for, work, and carry away, all mines, minerals, stone, and other substrata under the said lands, and to do all necessary or reasonable acts for the convenient exercise of this power and authority, he and they paying reasonable and adequate compensation to the persons entitled to the surface of such land for damage done to such surface in the exercise of the rights and easements intended to be hereby reserved. This power so set out and reserved to the lord of the said manor is to be subject to the power which the owner for the time being of every allotment is to have of taking and winning from such allotment any freestone, limestone, or crow-coal, for his own use, upon any of his allotments, or upon any of his ancient lands and tenements within the said manor, but not otherwise, nor for sale."

6. Amongst other lands thereby allotted and awarded the valuer by his award allotted and awarded certain portions of the land to be inclosed unto one T. Mowbray, deceased, such allotments being made to him in respect of land held by him in fee simple.

7. On the 12th of August, 1868, the defendants, by the authority of G. T. Mowbray, came upon the allotments so made to T. Mowbray, deceased, and then and there shot and carried away a grouse.

8. At the time when the defendants shot and carried away the grouse, G. T. Mowbray was the owner and in possession of the allotment so made to T. Mowbray, deceased, and the plaintiffs were the lords of the manor.

1871

MUSGRAVE v. FORSTER.

9. Neither T. Mowbray, deceased, nor G. T. Mowbray, nor any owner of the allotments, has in any way assented to the award, or done anything to ratify the same, except as herein appears.

The plaintiffs brought an action against the defendants for disturbing the plaintiffs' right and liberty of shooting and killing game upon lands which formerly constituted the waste lands of the manor.

The question for the opinion of the Court was whether the plaintiffs, as lords of the manor, are entitled to recover in this action.

April 25. *Manisty, Q.C.* (*Kemplay* with him), for the plaintiffs. *Field, Q.C.* (*Crompton* with him), for the defendants.

The arguments and sections of the statutes sufficiently appear from the judgment of the Court.

The following cases were cited in addition to those mentioned in the judgment: *Leconfield* v. *Dixon* (1); *Townley* v. *Gibson.* (2)

Cur. adv. vult.

May 26. The judgment of the Court (Cockburn, C.J., Blackburn and Lush, JJ.) was delivered by

BLACKBURN, J. In this case the question raised is whether the plaintiffs, as lords of the manor of Knaresdale, are entitled to the exclusive right of shooting over lands formerly a portion of the waste of that manor, but enclosed and allotted to the defendants under the award made in pursuance of a provisional order of the Inclosure Commissioners, dated the 25th of August, 1852, and directed to be proceeded with by the second Annual Inclosure Act, 1853 (16 & 17 Vict. c. 120).

The lords of the manor were before the inclosure owners of the soil (subject to the rights of common), and as such they had the right to take the game, not as a special or seignorial right, but as an ordinary incident of property. But the owner of the fee can sever the right to take the game from the ownership of the soil, and grant it as a separate tenement to another in fee: *Wickham* v. *Hawker* (3).

(1) Law Rep. 2 Ex. 202. (2) 2 T. R. 701.
(3) 7 M. & W. 63.

The questions involved in the present case are, first, whether the Inclosure Commissioners under the Inclosure Acts are authorized to make it a condition of the inclosure that the right of sporting should thus be severed from the right in the soil, and the tenement thus created remain with the lord, whilst the soil is allotted to others: or whether such a condition is ultra vires and void. And, secondly, whether, supposing the commissioners have such a power, they have in the present case sufficiently expressed their intention to exercise it in favour of the present plaintiffs.

The first question is one of general importance. The answer to it depends on the construction of the General Inclosure Act, 1845 (8 & 9 Vict. c. 118), as extended by 11 & 12 Vict. c. 99, s. 1. The General Inclosure Act, 1845, by s. 25, provides that, on an application made to the commissioners for that purpose by those who appear to them to represent at least one-third in value of the interests in the lands proposed to be inclosed, the commissioners, if on the statements made to them they think the inclosure may be found expedient, shall refer the application to an assistant-commissioner, who is to go down to the spot and make inquiries, and hold a meeting or meetings "to hear any objections which may be made to the proposed inclosure, and any information or evidence which may be offered in relation thereto," so that great care is taken that the terms of the proposed inclosure shall be thoroughly known and discussed in the locality. The assistant commissioner is then directed by s. 26 to report to the commissioners, and in case he thinks such inclosure expedient, "he may specify any terms or conditions which may appear to him to be proper for the protection of any public interest and of any mineral property or peculiar rights in relation to the land proposed to be enclosed." The right of the owner of the soil to take the game is certainly not aptly described by the words "peculiar right in relation to the land."

Then comes s. 27, which is the important one. The commissioners, on the report, or after any further inquiries they shall think necessary, are to determine whether, in their opinion, the proposed enclosure would be expedient, and if they so think, they by provisional order under their seal "shall set forth the terms and conditions on which they shall be of opinion that the enclo-

1871

MUSGRAVE v. FORSTER.

sure should be made, and especially" the allotments to be made for recreation, &c., and "in case the lord of the manor shall be entitled to the soil of the land proposed to be inclosed, shall specify" the proportion of the land that shall be allotted to him "in respect of his right and interest in the soil either exclusively or inclusively of his right or interest in all or any of the mines, &c., or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants, or any other right or interest of such lord in the land to be inclosed, as the case may appear to the commissioners to require, or as the parties interested, with the approbation of the commissioners, may have agreed: and in case there shall be any mineral property or rights in relation thereto not vested in the lord of the manor, or other rights which shall appear to the commissioners proper to be specially provided for upon such inclosure, or to be excepted from the operation thereof, shall specify the provisions or exceptions in that behalf." The section then goes on to provide that this provisional order shall be thoroughly known in the locality, and then, if two-thirds in value of the parties interested assent, the commissioners are again to give notice of their intention to include the provisional order in their annual report, and then, if no successful objection is made in parliament, the inclosure on those terms and conditions is to be proceeded with. It seems from this that the general effect of this scheme was to give the commissioners a wide discretion to consider whether the inclosure on the terms proposed was expedient or not. If they think it not expedient, they have an absolute power to refuse their assent. If they think it might be expedient, subject to terms and conditions, they may impose such terms and conditions, and then if two-thirds of those interested adopted the scheme, subject to such terms and conditions, and the legislature sanctioned it, it was to become law.

The lord of the manor has, by s. 29, an absolute veto on the inclosure of his waste. He may refuse his consent unless the parties interested agree that the right to take the game be severed from the right to the soil in the land proposed to be inclosed, and the tenement thus created reserved to the lord, the soil only being allotted. He is not bound to assent at all, and has a perfect right to make a stipulation to this effect.

It might be a matter of doubt whether, under the general Inclosure Act, as it was originally framed, the commissioners would have power to impose such a condition. The difficulty in so construing the Act is, that the right of the owner of the soil to take game is a general incident to the property in the soil, a mode of enjoying that property, and is not therefore aptly described as a "peculiar right," which is the phrase in s. 26, nor as an "other right or interest in the land," which is the phrase in s. 27, though it is in the power of the lord to sever it from the soil, and so create in another a peculiar right of this kind; and it might be said that the power of the commissioners to impose terms and conditions under the first Act is limited to imposing powers and conditions relating to rights already existing, and not to those to be created by the inclosure itself. But this difficulty seems to be completely removed by s. 1 of 11 & 12 Vict. c. 99, which enacts, that it shall be lawful for the commissioners in their provisional order "to set forth any special agreement or matter concerning or affecting the lands to be enclosed, and to make the same a condition of such inclosure." Those who framed this enactment seem to have discovered that the words of the former Act might be construed as restricting the power of the commissioners to imposing conditions of a particular kind only, and therefore enacted that their power should be in that respect unrestricted. At all events, if the lord of the manor made it a condition to his assent that the right to take the game should be severed from the right to the soil, and the persons interested agreed to this condition, and an inclosure was proposed on these terms, and the commissioners by their provisional order sanctioned the inclosure on the condition that this was done, they would be making that a condition which was both a "special agreement" and "a matter affecting the lands," and so would be acting not only within the meaning of the Act, but within the most literal construction of the words used.

The second question, whether the commissioners have so framed this particular provisional order as to make it a condition of the inclosure that the right to take the game should be severed from the right to the soil, so as to become a separate tenement, and that the lord should have the tenement so created, is one depending on

1871

MUSGRAVE v. FORSTER.

the construction of the provisional order. There might easily have been words found far more apt to describe this than those actually used: but it is impossible to avoid seeing that it was meant that this should be done; and I think that we ought to proceed upon the principle laid down in *Graham* v. *Ewart.* (1) There the language of a private Inclosure Act left no doubt that it was intended that the lord of the manor should enjoy over the land after it was inclosed, as a separate right, the same power of taking the game which he had de facto before the inclosure, as a mode of enjoying his property in the land whilst it was his own. And the majority of the Exchequer Chamber and the House of Lords held that, though the words used were not such as would be used by a lawyer to express an intention to create a fresh right, yet they were sufficient to effect that purpose, the intention being clear. Coleridge, J., in delivering the judgment of the majority in the Exchequer Chamber, says: "When it is clear from the context of an instrument in what sense words are used in that instrument, the sound rule of construction is to attribute to them that meaning, even though the words be technical, and have technically a different meaning; for it is only so that you can effectuate the intention." This is applicable to the present case.

The judgment, therefore, should be in favour of the plaintiffs.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Williams & James.*
Attorneys for defendants: *Bell, Brodrick, & Gray.*

(1) 1 H. & N. 557, 563; 26 L. J. (Ex.) 97, 102; 7 H. L. C. 331; 29 L. J. (Ex.) 88.

SMITH *v.* HUGHES.

1871
June 6.

Vendor and Vendee—Sale of Chattels—Passive Acquiescence of a Seller in the self-deception of the Buyer does not entitle the latter to avoid the Contract.

The plaintiff offered to sell to the defendant oats, and exhibited a sample; the defendant took the sample, and on the following day wrote to say that he would take the oats at the price of 34*s.* per quarter. The defendant afterwards refused to accept the oats on the ground that they were new, and he thought he was buying old oats; nothing, however, was said at the time the sample was shewn as to their being old; but the price was very high for new oats. The judge left to the jury the question whether the plaintiff had believed the defendant to believe, or to be under the impression, that he was contracting for old oats, and, if they were of opinion that the plaintiff had so believed, he directed them to find for the defendant. The jury having found for the defendant:—

Held, that there must be a new trial:

Per Cockburn, C.J., on the ground that the passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract.

Per Blackburn, J., on the ground that there is no legal obligation in a vendor to inform a purchaser that the latter is under a mistake not induced by the act of the vendor; and that the direction did not bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old.

Per Hannen, J., on the ground that the direction did not sufficiently explain to the jury that, in order to relieve the defendant from liability, it was necessary that they should find, not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that the plaintiff believed the defendant to believe that he, the plaintiff, was contracting to sell old oats.

APPEAL from the County Court of Surrey holden at Epsom.

The plaintiff sought to recover 34*l.* 15*s.* 8*d.*, being the price of sixteen quarters of oats sold by the plaintiff to the defendant at 34*s.* per quarter, and the loss on the resale by the plaintiff of twenty-nine quarters of oats agreed to be purchased by the defendant, and which he refused to receive; and the storage of the quarters of oats for five weeks.

The plaintiff is a farmer. The defendant is an owner and trainer of racehorses.

The plaintiff's evidence was as follows: "In July last I had a quantity of new winter oats for sale. I was anxious to get rid of them, because oats were then dear, the supply of English oats being very short. On Saturday, the 31st of July, I took a sample

1871

SMITH v. HUGHES.

of these oats to Hughes, who manages for the defendant, and asked him if he was a buyer of oats. He replied he was always a buyer of good oats. I said I had some good oats for sale; he asked me how many? I told him from forty to fifty quarters; he said he would have them all if they were good. I shewed him my sample, and asked 35*s.* a quarter; he took the sample, and said he would give me an answer next day. On the following Monday he wrote to me to say he would take the oats at 34*s.* a quarter, and I then sent in sixteen quarters. Soon afterwards I met the defendant, and he said, 'Why, those were new oats you sent me.' I replied, 'Well, I knew they were, and had none others.' He said, 'I thought I was buying old oats. New oats are useless to me; you must take them back again.' I refused to take them back." On cross-examination, the plaintiff said: "I was not aware that the defendant never bought new oats. I do not know that trainers never use new oats; a trainer has since this transaction offered me money for new oats. I never told defendant that they were old oats. Nothing was said about it: the word 'old' was not mentioned by either of us."

Hughes, the defendant's manager, stated: "The plaintiff asked me if I was a buyer of oats. I said I was always a buyer of good old oats. He said, 'I have some good old oats for sale,' and gave me a sample, and asked me 35*s.* a quarter. I said I would let him know. I wrote to say I would give him 34*s.* When I found they were new oats, I refused to have them, and they were immediately returned to the plaintiff on his refusal to fetch them back. I never buy new oats if I can get old. Trainers, as a rule, use old oats." On cross-examination, witness hesitated and contradicted himself somewhat as to whether the word "old" was used at the time of making the contract.

Evidence was also given for the defendant, that at the time of the contract 34*s.* a quarter was a very high price for new oats, and such as a prudent man of business would not have given; but that oats were then very scarce.

In summing up, the judge told the jury that the first question for their consideration was, whether the word "old" had been used by the plaintiff or defendant in making the contract, and that the inclination of his opinion was that the word "old" had not been

so used; but that was a question entirely for their consideration. If they were of opinion that the word "old" had been so used, they would return a verdict for the defendant. If, however, they thought that the word "old" had not been used, the second question would be, whether they were of opinion, on the state of the evidence, that the plaintiff believed the defendant to believe, or to be under the impression, that he was contracting for the purchase of old oats. If so, there would be a verdict for the defendant. But if the jury were of opinion that nothing was said as to the oats being old or new, and if they were of opinion that the plaintiff did not believe that the defendant believed or was under the impression that he was contracting for old oats, then they would find for the plaintiff.

The jury found a verdict for the defendant.

The question for the opinion of the Court was, whether the direction to the jury as above is or is not correct.

May 2. *Pollock, Q.C.* (*McKellar* with him), for the plaintiff. The judge was wrong to leave the second question to the jury. If the plaintiff believed the defendant to believe that he was buying old oats, the plaintiff was under no legal obligation to undeceive him. The defendant had the sample; he could judge for himself what he was buying, and if he had any doubt as to the subject-matter of the contract he might have demanded a warranty. In Benjamin on the Sale of Personal Property, p. 315, it is stated: "The mistaken belief as to facts may be created by active means or by fraudulent concealment, or knowingly false representation; or passively, by mere silence, when it is a duty to speak. But it is only where a party is under some pledge or obligation to reveal facts to another that mere silence will be considered as a means of deception." So in Story on Contracts, s. 519, it is laid down: "A distinction should be observed between the concealment of extrinsic circumstances affecting the value of the subject-matter of sale, or operating as an inducement to a contract, such as the state of the market; and the concealment of intrinsic circumstances appertaining to its nature, character, and condition, such as natural defects and injuries. In respect of intrinsic circumstances, the rule is that mere silence as to anything which the other party

1871

SMITH v. HUGHES.

might by proper diligence have discovered, and which is open to his examination, is not fraudulent unless a special trust or confidence exist between the parties, or be implied from the circumstance of the case. . . . In respect to extrinsic circumstances, the rule is that neither party is ordinarily bound to notify them to the other, and mere concealment will not nullify the contract. But the party concealing a fault must be careful to do no act and say no word indicative of his assent to any mistaken proposition by the other; and must play an entirely negative part, for if he do anything positive he will render himself liable." If, therefore, the plaintiff believed that the defendant was under the impression that he was buying old oats, and did nothing by word or act to produce this impression on the mind of the defendant, but merely allowed him to remain under that impression, the plaintiff's conduct is not such as would avoid the contract. According to Paley (1), a promise is to be interpreted "in the sense in which the promiser apprehended at the time that the promisee received it." The judge's direction ought to have been, that if the plaintiff believed the defendant to believe that the plaintiff had contracted to sell to the defendant old oats, then they should find their verdict for the defendant. The question as to the difference between concealment and mere silence is discussed by Cicero (2). He puts the case of a merchant at Rhodes selling corn in a time of scarcity, and asks the question whether the seller is bound to inform the buyer of what he is aware but the buyer is not, viz., that there are other ships laden with corn on their way to Rhodes. The conclusion arrived at appears to be that he is not acting dishonestly in not giving the information.

Arthur Wilson, for the defendant. The judge's direction, in substance, amounts to this: If the defendant contracted to buy old oats, he is not bound to accept new oats. And in that sense the direction is correct. If the plaintiff was selling new oats, and the defendant was buying old oats, the parties were not ad idem, and there was no contract; and that is what the jury have found. That the sale was by sample is immaterial; the sample only affects the quality, provided the subject-matter is the thing contracted for: *Azemar*-

(1) Paley's Moral and Political Philosophy, book III., chap. 5.

(2) Cicero de Officiis, Lib. III., capp. xii., xiii.

v. *Casella* (1); *Mody* v. *Gregson* (2). In Chitty on Contracts, 5th ed. p. 593, the law on the subject is thus stated: "It has been held that, where one party to a contract stands by and allows the other to enter into the contract under a delusion of the existence of which he was aware, and which he might have removed, the contract is void:" citing *Hill* v. *Gray* (3).

Pollock, Q.C., in reply. In *Keates* v. *Cadogan* (4), Jervis, C.J., points out that in *Hill* v. *Gray* (3) there appears to have been a positive aggressive deceit; and that case, therefore, is no authority for the proposition for which it is cited in Chitty on Contracts.

Cur. adv. vult.

June 6. The following judgments were delivered:—

COCKBURN, C.J. This was an action brought in the county court of Surrey, upon a contract for the sale of a quantity of oats by plaintiff to defendant, which contract the defendant had refused to complete, on the ground that the contract had been for the sale and purchase of *old* oats, whereas the oats tendered by the plaintiff had been oats of the last crop, and therefore not in accordance with the contract.

The plaintiff was a farmer, the defendant a trainer of racehorses. And it appeared that the plaintiff, having some good winter oats to sell, had applied to the defendant's manager to know if he wanted to buy oats, and having received for answer that he (the manager) was always ready to buy good oats, exhibited to him a sample, saying at the same time that he had forty or fifty quarters of the same oats for sale, at the price of 35*s.* per quarter. The manager took the sample, and on the following day wrote to say he would take the whole quantity at the price of 34*s.* a quarter.

Thus far the parties were agreed; but there was a conflict of evidence between them as to whether anything passed at the interview between the plaintiff and defendant's manager on the subject of the oats being *old* oats, the defendant asserting that he had expressly said that he was ready to buy old oats, and that the plaintiff had replied that the oats were old oats, while the

(1) Law Rep. 2 C. P. 431.
(2) Law Rep. 4 Ex. 49.
(3) 1 Stark, 434.
(4) 10 C. B. 591; 20 L. J. (C.P.) 76.

1871

SMITH, v. HUGHES.

plaintiff denied that any reference had been made to the oats being old or new.

The plaintiff having sent in a portion of the oats, the defendant, on meeting him afterwards, said, "Why, those were new oats you sent me;" to which the plaintiff having answered, "I knew they were; I had none other." The defendant replied, "I thought I was buying old oats: new oats are useless to me; you must take them back." This the plaintiff refused to do, and brought this action.

It was stated by the defendant's manager that trainers as a rule always use old oats, and that his own practice was never to buy new oats if he could get old.

But the plaintiff denied having known that the defendant never bought new oats, or that trainers did not use them; and, on the contrary, asserted that a trainer had recently offered him a price for new oats. Evidence was given for the defendant that 34*s.* a quarter was a very high price for new oats, and such as a prudent man of business would not have given. On the other hand, it appeared that oats were at the time very scarce and dear.

The learned judge of the county court left two questions to the jury: first, whether the word "old" had been used with reference to the oats in the conversation between the plaintiff and the defendant's manager; secondly, whether the plaintiff had believed that the defendant believed, or was under the impression, that he was contracting for old oats; in either of which cases he directed the jury to find for the defendant.

It is to be regretted that the jury were not required to give specific answers to the questions so left to them. For, it is quite possible that their verdict may have been given for the defendant on the first ground; in which case there could, I think, be no doubt as to the propriety of the judge's direction; whereas now, as it is possible that the verdict of the jury—or at all events of some of them—may have proceeded on the second ground, we are called upon to consider and decide whether the ruling of the learned judge with reference to the second question was right.

For this purpose we must assume that nothing was said on the subject of the defendant's manager desiring to buy *old* oats, nor of the oats having been said to be old; while, on the other hand, we must assume that the defendant's manager believed the oats to be old

oats, and that the plaintiff was conscious of the existence of such belief, but did nothing, directly or indirectly, to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party. The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion that it will not.

The oats offered to the defendant's manager were a specific parcel, of which the sample submitted to him formed a part. He kept the sample for twenty-four hours, and had, therefore, full opportunity of inspecting it and forming his judgment upon it. Acting on his own judgment, he wrote to the plaintiff, offering him a price. Having this opportunity of inspecting and judging of the sample, he is practically in the same position as if he had inspected the oats in bulk. It cannot be said that, if he had gone and personally inspected the oats in bulk, and then, believing—but without anything being said or done by the seller to bring about such a belief—that the oats were old, had offered a price for them, he would have been justified in repudiating the contract, because the seller, from the known habits of the buyer, or other circumstances, had reason to infer that the buyer was ascribing to the oats a quality they did not possess, and did not undeceive him.

I take the true rule to be, that where a specific article is offered for sale, without express warranty, or without circumstances from which the law will imply a warranty—as where, for instance, an article is ordered for a specific purpose—and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule caveat emptor applies. If he gets the article he contracted to buy, and that article corresponds with what it was sold as, he gets all he is entitled to, and is bound by the contract. Here the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely, good oats according to the sample. The buyer persuaded himself they were old oats, when they were not so; but the seller neither said nor did anything to contribute to his deception. He has himself to blame. The question is not what a man of scrupulous morality or nice honour would do under such circumstances.

1871

SMITH v. HUGHES.

The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding.

Mr. Justice Story, in his work on Contracts (vol. i. s. 516), states the law as to concealment as follows:—"The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operate as an injury to the party from whom it is concealed." "Thus," he goes on to say (s. 517), "although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet, under the general doctrine of caveat emptor, he is not, ordinarily, bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee." "But," he continues (s. 518), "an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent, and will invalidate a contract." Further, distinguishing between extrinsic circumstances affecting the value of the subject-matter of a sale, and the concealment of intrinsic circumstances appertaining to its nature, character, and condition, he points out (s. 519), that with reference to the latter, the rule is "that mere silence as to anything which the other party might by proper diligence have discovered, and which is open to his examination, is not fraudulent, unless a special trust or confidence exist between the parties, or be implied from the circumstances of the case." In the doctrine thus laid down I entirely agree.

Now, in this case, there was plainly no legal obligation in the plaintiff in the first instance to state whether the oats were new or old. He offered them for sale according to the sample, as he had a perfect right to do, and gave the buyer the fullest opportunity of inspecting the sample, which, practically, was equivalent to an inspection of the oats themselves. What, then, was there to create

1871

SMITH v. HUGHES.

any trust or confidence between the parties, so as to make it incumbent on the plaintiff to communicate the fact that the oats were not, as the defendant assumed them to be, old oats? If, indeed, the buyer, instead of acting on his own opinion, had asked the question whether the oats were old or new, or had said anything which intimated his understanding that the seller was selling the oats as old oats, the case would have been wholly different; or even if he had said anything which shewed that he was not acting on his own inspection and judgment, but assumed as the foundation of the contract that the oats were old, the silence of the seller, as a means of misleading him, might have amounted to a fraudulent concealment, such as would have entitled the buyer to avoid the contract. Here, however, nothing of the sort occurs. The buyer in no way refers to the seller, but acts entirely on his own judgment.

The case of *Horsfall* v. *Thomas* (1), if that case can be considered good law, is an authority in point. In that case a gun which had been manufactured for a purchaser, had, when delivered, a defect in it, which afterwards caused it to burst; yet it was held that, although the manufacturer, instead of making the purchaser acquainted with the defect, had resorted to a contrivance to conceal it, as the buyer had had an opportunity of inspecting the gun, and had accepted it without doing so, and had used it, it was not competent to him to avoid the contract on the ground of fraud. The case has, however, been questioned, and dissenting altogether from the decision, I notice it only to say that my opinion in the present case has been in no degree influenced by its authority.

In the case before us it must be taken that, as the defendant, on a portion of the oats being delivered, was able by inspection to ascertain that they were new oats, his manager might, by due inspection of the sample, have arrived at the same result. The case is, therefore, one of the sale and purchase of a specific article after inspection by the buyer. Under these circumstances the rule caveat emptor clearly applies; more especially as this cannot be put as a case of latent defect, but simply as one in which the seller did not make known to the buyer a circumstance affecting the quality of the thing sold. The oats in question were in no sense

(1) 1 H. & C. 90; 31 L. J. (Ex.) 322.

1871

SMITH v. HUGHES.

defective, on the contrary they were good oats, and all that can be said is that they had not acquired the quality which greater age would have given them. There is not, so far as I am aware, any authority for the position that a vendor who submits the subject-matter of sale to the inspection of the vendee, is bound to state circumstances which may tend to detract from the estimate which the buyer may injudiciously have formed of its value. Even the civil law, and the foreign law, founded upon it, which require that the seller shall answer for latent defects, have never gone the length of saying that, so long as the thing sold answers to the description under which it is sold, the seller is bound to disabuse the buyer as to any exaggerated estimate of its value.

It only remains to deal with an argument which was pressed upon us, that the defendant in the present case intended to buy old oats, and the plaintiff to sell new, so the two minds were not ad idem; and that consequently there was no contract. This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is, that the two minds were not ad idem as to the age of the oats; they certainly were ad idem as to the sale and purchase of them. Suppose a person to buy a horse without a warranty, believing him to be sound, and the horse turns out unsound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound one, the contract was void, because the seller must have known from the price the buyer was willing to give, or from his general habits as a buyer of horses, that he thought the horse was sound? The cases are exactly parallel.

The result is that, in my opinion, the learned judge of the county court was wrong in leaving the second question to the jury, and that, consequently, the case must go down to a new trial.

BLACKBURN, J. In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the

bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor. And I also agree that where a specific lot of goods are sold by a sample, which the purchaser inspects instead of the bulk, the law is exactly the same, if the sample truly represents the bulk; though, as it is more probable that the purchaser in such a case would ask for some further warranty, slighter evidence would suffice to prove that, in fact, it was intended there should be such a warranty. On this part of the case I have nothing to add to what the Lord Chief Justice has stated.

But I have more difficulty about the second point raised in the case. I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman* v. *Cooke* (1). If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

The jury were directed that, if they believed the word "old" was used, they should find for the defendant—and this was right; for if that was the case, it is obvious that neither did the defendant intend to enter into a contract on the plaintiff's terms,

(1) 2 Ex. at p. 663; 18 L. J. (Ex.) at p. 119.

1871

SMITH v. HUGHES.

that is, to buy this parcel of oats without any stipulation as to their quality; nor could the plaintiff have been led to believe he was intending to do so.

But the second direction raises the difficulty. I think that, if from that direction the jury would understand that they were first to consider whether they were satisfied that the defendant intended to buy this parcel of oats on the terms that it was part of his contract with the plaintiff that they were old oats, so as to have the warranty of the plaintiff to that effect, they were properly told that, if that was so, the defendant could not be bound to a contract without any such warranty unless the plaintiff was misled. But I doubt whether the direction would bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old.

The difference is the same as that between buying a horse believed to be sound, and buying one believed to be warranted sound; but I doubt if it was made obvious to the jury, and I doubt this the more because I do not see much evidence to justify a finding for the defendant on this latter ground if the word "old" was not used. There may have been more evidence than is stated in the case; and the demeanour of the witnesses may have strengthened the impression produced by the evidence there was; but it does not seem a very satisfactory verdict if it proceeded on this latter ground. I agree, therefore, in the result that there should be a new trial.

HANNEN, J. I think there should be a new trial in this case, not because the ruling of the county court judge was incorrect, but because, having regard to the evidence, I think it doubtful whether the jury sufficiently understood the direction they received to enable them to take it as their guide in determining the question submitted to them.

It appears from the evidence on both sides that the plaintiff sold the oats in question by a sample which the defendant's agent took away for examination. The bargain was only completed after this sample had been in the defendant's possession for two days. This, without more, would lead to the conclusion that the defendant

1871

SMITH v. HUGHES.

bought on his own judgment as to the quality of the oats represented by the sample and with the usual warranty only, that the bulk should correspond with it. There might, however, be superadded to this warranty an express condition that the oats should be old, and the defendant endeavoured by his evidence to establish that there was such an express bargain between him and the plaintiff. This was the first question which the jury had to consider; but as they have not stated whether they answered it in favour of the defendant, it is possible—and, from the judge's report, it is most probable—that they did not so answer it, and the case must be considered on the assumption that there was no express stipulation that the oats were old.

There might have been an implied term in the contract arising from previous dealings or other circumstances, that the oats should be old; but the learned judge probably thought the evidence did not make it necessary that he should leave this question to the jury. And the second question, which he did leave to them, seems intended to ascertain whether there was any contract at all between the parties.

It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them: *Raffles* v. *Wichelhaus*. (1)

But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in the case of a sale by sample where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor: *Scott* v. *Littledale*. (2)

But if in the last-mentioned case the purchaser, in the course of the negotiations preliminary to the contract, had discovered that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to shew that he had not intended to enter into the contract by which the purchaser

(1) 2 H. & C. 906; 33 L. J. (Ex.) 160.
(2) 8 E. & B. 815; 27 L. J. (Q.B.) 201.

1871

SMITH v. HUGHES.

sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality which Mr. Pollock cited from Paley (1), that a promise is to be performed "in that sense in which the promiser apprehended at the time the promisee received it," and may be thus expressed: "The promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it." And in considering the question, in what sense a promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning in which the promiser made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent.

If, therefore, in the present case, the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent, and not the real bargain.

This was the question which the learned judge intended to leave to the jury; and, as I have already said, I do not think it was incorrect in its terms, but I think that it was likely to be misunderstood by the jury. The jury were asked, "whether they were of opinion, on the whole of the evidence, that the plaintiff believed the defendant to believe, or to be under the impression that he was contracting for the purchase of old oats? If so, there would be a verdict for the defendant." The jury may have understood this to mean that, if the plaintiff believed the defendant to believe that he was buying old oats, the defendant would be entitled to the verdict; but a belief on the part of the plaintiff that the defendant was making a contract to buy the oats, of which he offered him a sample, under a mistaken belief that they were old, would not relieve the defendant from liability unless his mistaken belief were induced by some misrepresentation of the plaintiff, or concealment

(1) Moral and Political Philosophy, Book III., ch. v.

by him of a fact which it became his duty to communicate. In order to relieve the defendant it was necessary that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats.

I am the more disposed to think that the jury did not understand the question in this last sense because I can find very little, if any, evidence to support a finding upon it in favour of the defendant. It may be assumed that the defendant believed the oats were old, and it may be suspected that the plaintiff thought he so believed, but the only evidence from which it can be inferred that the plaintiff believed that the defendant thought that the plaintiff was making it a term of the contract that the oats were old is that the defendant was a trainer, and that trainers, as a rule, use old oats; and that the price given was high for new oats, and more than a prudent man would have given.

Having regard to the admitted fact that the defendant bought the oats after two days' detention of the sample, I think that the evidence was not sufficient to justify the jury in answering the question put to them in the defendant's favour, if they rightly understood it; and I therefore think there should be a new trial.

Judgment accordingly.

Attorneys for plaintiff: *Park & W. B. Nelson.*

Attorney for defendant: *Haynes.*

1871
June 7.

MACROW *v.* THE GREAT WESTERN RAILWAY COMPANY.

Carriers by Railway—"Ordinary Passenger's Luggage."

Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, is to be considered as personal luggage.

The plaintiff, a passenger by the defendants' railway from Liverpool to London, took with him in a trunk, as his personal luggage, six pairs of sheets, six pairs of blankets, and six quilts. He had given up his residence in Canada, and these articles were intended for the use of his household when he should have provided himself with a home in London. The trunk having been lost, he sought to recover the value of the articles from the defendants:—

Held, that the articles, being intended for the use of the plaintiff's household when permanently settled, could not be considered as personal or "ordinary passenger's luggage."

FIRST COUNT that the defendants are common carriers from Liverpool to London, and the plaintiff delivered to the defendants certain goods, to wit, a trunk and articles contained therein, and the defendants received the same to be safely and securely carried by them, as such common carriers, from Liverpool to London, and there delivered to the plaintiff for reward to the defendants; averment of conditions precedent; yet the defendants did not safely and securely carry the goods from Liverpool to London, or deliver them to the plaintiff.

Second count, that in consideration that the plaintiff would entrust to the defendants certain goods, to wit, a trunk and articles contained therein, and would pay to the defendants a certain sum of money, the defendants promised the plaintiff that they would safely and securely carry the goods from Liverpool to London, and there deliver them to the plaintiff; that the plaintiff entrusted the goods to the defendants, and paid to the defendants the sum of money; averments of all conditions precedent; yet the defendants did not safely and securely carry the goods and deliver them to the plaintiff.

Third count, that the defendants are common carriers from Liverpool to London as in the first count mentioned, and the plaintiff delivered to the defendants certain goods, to wit, a trunk and articles contained therein, and the defendants received the

same to be by them safely and securely carried as such common carriers from Liverpool to London, and there delivered to the plaintiff within a reasonable time in that behalf; averments of all conditions precedent; yet the defendants did not deliver the goods to the plaintiff within a reasonable time.

Pleas: 1. As to the first, second, and third counts, so far as they relate to a certain part of the goods, payment into court of 39*l.* 4*s.* 2. As to the first and third counts, so far as they relate to the residue of the goods, not guilty. 3. As to same, that the defendants were not common carriers from Liverpool to London, and that the plaintiff did not deliver to the defendants the goods, nor did they receive them as such common carriers for the purposes and on the terms in those counts alleged. 4. As to the first and second counts, so far as they relate to certain articles, part of the residue of the goods therein mentioned, a plea under the Carriers Act (1 Wm. 4, c. 68), that the articles were within the Act, and were above the value of 10*l.*, and were not declared or insured. 5. As to the second count, so far as it relates to the residue of the goods, that the defendants did not promise as alleged. 6. As to the same, that the plaintiff did not entrust the goods to the defendants or pay the sum of money as alleged. 7. As to the same, that the defendants safely carried the goods and delivered them to the plaintiff. 8. As to the third count, a plea similar to the fourth plea.

The plaintiff accepted the money paid into court, and joined issue on the pleas.

At the trial before Blackburn, J., at the Middlesex sittings after Michaelmas Term, 1870, it was proved that the plaintiff, who had recently arrived from Canada, was a passenger by the defendants' railway from Liverpool to London. He took with him, amongst other luggage, as passenger's luggage, a trunk, which was lost. The trunk contained (amongst other things) six pairs of sheets, six pairs of blankets, and six quilts, which he intended for the use of his household when he should have provided himself with a home in London.

It was contended for the defendants that these articles were not personal luggage, but household goods, and that the defendants were not liable in respect of them.

1871

MACROW v. GREAT WESTERN RAILWAY CO.

The learned judge left the value of the contents of the trunk to the jury (excepting certain things which he ruled were within the Carriers Act), and also the question whether the sheets, &c., were personal luggage, asking them whether they were such things as a passenger might fairly take with him when he had given up one residence and was in search of another, and also required them to assess the value of these articles separately.

The jury found the value of the contents of the trunk to be 22*l.* 8*s.* 6*d.* beyond the sum paid into court, and that the articles were personal luggage, and that their value was 16*l.*

The learned judge reserved leave to the defendants to move to reduce the verdict by 16*l.*

A rule was afterwards obtained to reduce the verdict accordingly, on the ground that the articles were household goods, and not plaintiff's passenger's luggage.

May 8. *Bompas* shewed cause. The articles in question are passenger's luggage. Passenger's luggage is something more than the passenger requires for his own personal use and convenience; all those things which are ordinarily and usually carried by travellers as their luggage fall within the definition. Merchandise, or things carried for sale, *Cahill* v. *London and North Western Ry. Co.* (1), deeds and money, if they belong to persons other than the traveller, *Phelps* v. *London and North Western Ry. Co.* (2), and articles which from their unusual size and shape cannot be conveniently carried with the passenger, *Hudston* v. *Midland Ry. Co.* (3), have been decided not to be passenger's luggage. But in the last case it was laid down, in substance, that when a railway company undertake to carry a passenger and his luggage, it means that the passenger shall be allowed to carry something more than that which he requires for his own personal use and convenience, and he may take with him a class of articles which are ordinarily and usually carried by travellers as their luggage. The jury have found, in effect, that the articles in question are ordinarily and usually carried by travellers as their luggage in moving from one place of abode to another. In *Ouimit* v. *Henshaw* (4) it was held that

(1) 13 C. B. (N.S.) 818; 31 L. J. (C.P.) 271. 8 Jur. N.S. 1063

(2) 19 C. B. (N.S.) 321; 34 L. J. (C.P.) 259. 11 Jur. N.S. 652

(3) Law Rep. 4 Q. B. 366.

(4) 35 Vermont Rep. 605.

a man, travelling from Canada to the United States with a bed pillows, bedding, and bed-quilts, was entitled to take those articles with him as his personal luggage. If a person travelling to the sea-side with his family for a short time, took with him sheets, and blankets, and linen, could it be said that such articles are not passenger's ordinary luggage? They are things which are usually carried on such occasions. The defendants have accepted these articles to be carried as passenger's ordinary luggage; they have admitted it is luggage, and they cannot exonerate themselves from their responsibility. Their liability in respect of passenger's luggage is as stringent as that in respect of the ordinary carriage of goods: *Talley* v. *Great Western Ry. Co.* (1). By the defendants' Act (9 & 10 Vict. c. xci. s. 63), "Every passenger travelling upon the railway may take with him his ordinary luggage, not exceeding 100 lbs. in weight for first-class passengers, 60 lbs. in weight for second-class passengers, and 40 lbs. in weight for third-class passengers, without any charge being made for the carriage thereof." Ordinary luggage must be construed with reference to the position of the passenger and the object of his journey. These articles are the ordinary luggage of a passenger of the plaintiff's position in life, travelling from his late abode in Canada to London, where he contemplates taking up his abode. They are within the well-known definition of passenger's luggage given in Story on Bailments, s. 499, and Angel on Carriers, s. 115.

J. Digby in support of the rule. The defendants are not liable for these articles, which, in truth, are household goods, and not personal luggage. No doubt they have accepted them to be carried with the passenger on the journey; but the onus of proving that they are passenger's personal or ordinary luggage is on the plaintiff: *Elwell* v. *Grand Junction Ry. Co.* (2). The same point was decided in *Cahill* v. *London and North Western Ry. Co.* (3) The contract is to carry the passenger and his ordinary luggage; it is on that assumption that the company undertook to carry the luggage; if they have notice that the articles are not ordinary luggage, and they accept them, they will be presumed to have waived the right to object, and will be liable for the loss of them;

(1) Law Rep. 6 C. P. 44. (2) 5 M. & W. 669.
(3) 13 C. B. (N.S.) 818; 31 L. J. (C.P.) 271.

1871

MACROW v. GREAT WESTERN RAILWAY CO.

but if they do not know the nature of the articles tendered to them there can be no waiver, and they are exempted from liability: *Great Northern Ry. Co.* v. *Shepherd* (1). The cases decided in the American Courts are not applicable to England; in that country the length of the journey and the requirements of travelling would make that luggage in the one country which would not be considered luggage in the other. It is difficult to define passenger's luggage; but the articles a man takes with him as his personal luggage must be such articles as are connected with locomotion, and not merely those which he wants to transport from one place to another. All such things as are required, and are necessary for the personal use of the passenger in the course of his journey, without regard to the object for which the journey was undertaken, would be ordinary luggage. The articles in question were not intended for the use of the passenger while travelling, but to furnish a new residence, and can in no way be said to be "ordinary" or "personal luggage." It might as well be said that articles of household furniture—as a chair or a table—are ordinary luggage.

Cur. adv. vult.

June 7. The judgment of the Court (Cockburn, C.J., Blackburn and Mellor, JJ.,) was delivered by

COCKBURN, C.J. This was an action brought by the plaintiff for compensation for the loss of luggage lost while travelling as a passenger on the defendants' railway. At the trial before my Brother Blackburn the question turned on how far the articles lost came within the description of ordinary passengers' luggage. A verdict passed for the plaintiff.

It appeared that the defendants' company had received with the plaintiff, who was a passenger on their line, a box as part of his personal luggage, and that this, having been placed in the luggage-van, was lost on the journey.

It was to recover the value of the contents of this box that the action was brought. The defendants paid money into court as to part, and as to the residue pleaded the Carriers Act; and also denied that they were responsible for the articles on the ground that they were not personal luggage.

(1) 8 Ex. 30; 21 L. J. (Ex.) 286.

The plaintiff had recently returned from Canada, with the intention of settling in England, but had not yet provided himself with a home. Amongst other articles which were in the box were six pairs of sheets, six pairs of large blankets and six large quilts, which had formed part of his household goods in Canada, and which he intended to be again part of his household goods when he should have provided himself with a home. The judge reserved leave to reduce the amount of the verdict, if found for the plaintiff, by the value of these things, if they were not personal luggage for which the defendants were responsible; and, subject to this reservation, directed the jury that some of the articles were clearly covered by the Carriers Act, as to which he left no question to them. As to other articles, including the sheets, blankets and quilts in question, he left it to the jury to say whether they were personal luggage or not, and directed them to assess their value.

The jury found that the blankets and sheets and quilts were personal luggage, and of the value of 16*l*. The value of all the articles for which, according to the finding, the defendants were responsible, exceeded the money paid into court by 22*l*. 8*s*. 6*d*. The verdict was entered, therefore, for this amount, subject to leave to move to reduce it by 16*l*.

A rule to that effect was accordingly obtained, against which cause was shewn before my Brothers Blackburn, Mellor, and myself.

By the Act of Parliament by which the company is constituted it is provided that passengers by the railway shall be entitled to have a fixed quantity of ordinary luggage, according to their respective classes, conveyed with them free of charge. (1)

The question for our decision is whether the articles of bedding hereinbefore referred to can be considered as ordinary passengers' luggage.

The impossibility of travelling without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveller has led from the earliest times to the practice on the part of carriers of passengers for hire of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration

(1) See 9 & 10 Vict. c. xci. s. 67, cited, ante, p. 615.

1871

MACROW v. GREAT WESTERN RAILWAY CO.

for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger. Under the older system of travelling by stage-coaches, canal boats, or other vessels, the amount of luggage to be thus carried free of charge was commonly made part of the contract by express stipulation or notice from the carrier. Under the modern system of railway conveyance, it is fixed and regulated by the various Acts of Parliament under which railways have been established.

The provision fixing the amount of luggage which the traveller shall be entitled to take with him free of charge has a twofold object: first, that of securing to the traveller the conveyance of a reasonable amount of luggage; secondly, that of protecting the carrier from all dispute as to the amount of luggage which the passenger may claim to have carried, as well as of entitling the former to a proper remuneration for the carriage of luggage in excess of the quantity thus fixed by statute.

Besides thus fixing the quantum of luggage which the passenger shall be entitled to have carried free of charge, the railway Acts have, in conformity with the practice of carriers under the old system, taken care expressly to limit the right of the passenger to ordinary luggage, which must be taken to mean the personal luggage of the traveller.

The conveyance of the personal luggage of the passenger being obviously for his convenience, and, therefore, accessory, as it were, to his conveyance, it may be thought that the liability of the carrier in respect of the safe conveyance of passengers' luggage should have been co-extensive only with the liability in respect of the safety of the passenger. The law, however, is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carriers of passengers; unless, indeed, where the passenger himself takes the personal charge of them, as in *Talley* v. *Great Western Ry. Co.* (1), in which case other considerations arise.

On the other hand the obligation of a railway company, or other carrier of passengers, to carry the luggage of a passenger being limited to personal luggage, it follows that it is only in respect of

(1) Law Rep. 6 C. P. 44.

what properly falls under the denomination of personal luggage, or has been accepted by the carrier as such, that the liability to carry safely, irrespectively of negligence, attaches.

It is necessary to state the proposition with this qualification; for, as the limitation, both as to the quantity and the character of the luggage to be carried, is established for the protection of the carrier, it follows that in either respect it may be waived by the latter; and, consequently, that if the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligence.

Thus in the case of *Great Northern Ry. Co.* v. *Shepherd* (1), Lord Wensleydale says: "If the company had notice that a passenger brought with him goods which were not luggage, and they chose to carry them, they would be responsible." Again he says: "If the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage and carry them without demanding any extra remuneration, they would have been responsible for the loss So also upon any limit in point of weight, if the company chose to allow a passenger to carry more, they would be liable."

In like manner, in *Cahill* v. *London and North Western Ry. Co.* (2), I expressed the opinion of the Court of Exchequer Chamber when I said, "If a railway company, who by their Act of Parliament are bound or by their regulations profess to carry personal luggage free, choose to take as ordinary luggage that which they know to be merchandise, I quite agree that it is not competent to them, in the event of a loss, to claim exemption from liability on the ground that the article consists of merchandise and not of ordinary luggage. But, on the other hand, if a passenger who knows or ought to know that he is only entitled to have his ordinary personal luggage carried free of charge, chooses to carry with him merchandise, for which the company are entitled to make a charge, he

(1) 8 Ex. 30; 21 L. J. (Ex) 286.
(2) 13 C. B. (N.S.) 818; 31 L. J. (C.P.) 271. 8 Jur. N.S. 1063.

1871

MACROW v. GREAT WESTERN RAILWAY CO.

cannot claim to be compensated in respect of any loss or injury by the company, to whom he has abstained from giving notice of the contents. In such a case he carries it at his own risk."

It being clear that the contract on the part of a railway company is to carry personal luggage only, it follows that it is only in respect of what can properly be termed personal luggage that a liability in case of loss, in the absence of negligence, arises. The difficulty in the present case, as it has been in many others, is to determine what properly comes under the description of ordinary personal luggage. The definition of baggage, which is here a synonym of luggage, given in Story on Bailments, s. 499—namely, "such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use but for other purposes, such as a sale and the like"—though it appears to have been approved of by Lord Wensleydale in the case before cited, has been criticised in America, as appears from the note of the editor of the 7th edition of Mr. Justice Story's work, on the ground that what is "usually" carried by one man differs materially from what is usually carried by another. It seems to us, however, a misapprehension to suppose that Mr. Justice Story intended to say that ordinary passengers' luggage comprehended only that which was common to all passengers. We believe him to have used the term "usually" relatively to the habits and wants of the different sorts and classes of travellers.

In *Phelps* v. *London and North Western Ry. Co.* (1), which is an authority binding upon us, the question for the Court was whether an attorney, travelling as a passenger on a railway, was entitled to carry with him in his portmanteau, as ordinary luggage, the deeds and documents which were required as evidence on a trial which he was going to attend. The Court of Common Pleas held that he was not. Erle, C.J., says: "It is agreed on all hands that it is impossible to draw any very well-defined line as to what is and what is not necessary or ordinary luggage for a traveller: that which one traveller would consider indispensable would be deemed superfluous and unnecessary by another. *But the general habits*

(1) 19 C. B. (N.S.) 321; 34 L. J. (C.P.) 259.

and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance."

This at once illustrates in what sense the word "usually" is employed by Story, and affords a strong reason why the word "usual," or the word "ordinary," or some word equivalent in effect, should be considered as qualifying the word "luggage." The cases of *Cahill* v. *London and North Western Ry. Co.* (1), *Great Northern Ry.* v. *Shepherd* (2), and *Belfast and Ballymena Ry. Co.* v. *Keys* (3) establish that articles of merchandise cannot be considered as personal luggage.

In *Hudston* v. *Midland Ry. Co.* (4) the point arose in a different manner. The plaintiff there had tendered to the company a spring horse which he had purchased, and was taking home to his children as part of his luggage. The company refused to receive it unless he paid for the carriage, whereupon he paid the charge, and afterwards brought an action to recover back the sum he had so paid. My Brother Lush in that case observes: "It is extremely difficult to frame a definition in terms which shall embrace all that is intended to be brought within the regulation, and exclude all that is intended to be excluded. I cannot say that I am satisfied with any of the definitions which have hitherto been given. They have been quite enough for the cases in which they have been pronounced, but it does not appear to me that any of them are perfect." He then proceeds to say: "The only definition I can think of, and one which is sufficient for this case, is that the words of the statute describe a class of articles which are ordinarily or usually carried by travellers as their luggage." He then proceeds to hold that the dimensions and size of this spring horse took it out of this definition.

Considering the way in which the point arose in the last case, namely, on the refusal of the company to accept and carry it gratis, it was certainly relevant to inquire whether the article was such as might be reasonably rejected by the company on account of its size and shape, though it did not exceed the statutable weight.

While the authorities referred to establish that a passenger cannot claim to have carried as ordinary personal luggage articles

(1) 13 C. B. (N.S.) 818; 31 L. J. (C.P.) 271.

(2) 8 Ex. 30; 21 L. J. (Ex.) 286.

(3) 9 H. L. C. 556.

(4) Law Rep. 4 Q. B. 366.

1871

MACROW v. GREAT WESTERN RAILWAY CO.

unconnected with the personal use and convenience of the traveller, or, as in *Hudston* v. *Midland Ry. Co.* (1), of such a size and shape as that they cannot reasonably be carried as luggage, we hold the true rule to be that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament—leaving the carrier herein to the protection of the Carriers Act, to which, being held to be liable in respect of passengers' luggage as a carrier of goods, he undoubtedly becomes entitled—but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying.

On the other hand the term "ordinary luggage" being thus confined to that which is personal to the passenger and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage unless accepted as such by the carrier.

The articles as to which the question in the present case arises consisted of bedding. Now, though we are far from saying that a pair of sheets, or the like, taken by a passenger for his own use on a journey, might not fairly be considered as personal luggage, it appears to us that a quantity of articles of this description, intended, not for the use of the traveller on the journey, but for the use of his household when permanently settled, cannot be held to be so.

We are, therefore, of opinion that the rule to reduce the damages in respect of these articles must be made absolute.

Rule absolute.

Attorneys for plaintiff: *Bischoff, Bompas, & Bischoff.*
Attorneys for defendants: *Young, Maples, & Co.*

(1) Law Rep. 4 Q. B. 366.

FOLLARD AND ANOTHER v. THE BANK OF ENGLAND. 1871 July 6.

Bankers, Practice of as to provisional Statement of Accounts—Bill of Exchange, Payment of by Bankers under a Mistake.

The bankers at N. have accounts at the branch bank there of the defendants, the Bank of England: and it is the practice that each banker, having previously ascertained that the bills, cheques, &c., on the other banks will be paid, hands them to the defendants for collection; and they accordingly, at 2 P.M., present the bills, &c., to the drawees, and a cheque is drawn upon the defendants for the aggregate amount, which is then placed to the debit of the drawee's account with the defendants. If the defendants are themselves the holders of a bill, it is presented earlier in the morning to ascertain whether it will be paid, and if so, it is left with the drawee, and a credit-note is given in exchange, and afterwards, upon the presenting of the cheques, &c., this credit-note is taken into the account, and forms part of the sum for which the cheque on the defendants is given. The banks close to the public at 3 P.M., but the bankers' accounts with the defendants' branch are kept open till 4; and between those hours the bankers attend for the purpose of having the day's accounts between them and the defendants investigated, and of rectifying any mistakes and errors of any kind that may have arisen, and of finding and striking the final balance between them; and all mistakes and errors made in the course of the day are subject to correction during that investigation.

The plaintiffs had an account with the defendants' branch bank, and the defendants discounted for them a bill, accepted payable at L. & Co. (one of the bankers at N.), of which the plaintiffs were the payees and indorsers. On the morning of the day when the bill became due, the defendants' clerk took the bill to L. & Co., and it was marked by them for payment, and a credit-note was given to the defendants including the amount of the bill. About 2 P.M. the same day, the defendants' clerk took all the cheques drawn on L. & Co. and the credit-note to L. & Co., and they handed to the defendants' clerk a cheque for the aggregate amount. After the closing of L. & Co.'s bank on the same day, the clerk, who had given the credit-note including the bill, ascertained from the ledger-keeper that the acceptor had not a balance sufficient to meet the bill, and it was also further ascertained that he had stopped payment. Thereupon, at 3.30 P.M., L. & Co.'s out-teller requested the defendants to take back the bill. This the defendants did under protest. At this time the defendants had already placed the amount of the bill to the debit of L. & Co. in their account with the defendants. Neither the plaintiffs nor the defendants sustained any damage from the mistake of L. & Co.:—

Held, that the plaintiffs were entitled to have credit with the defendants for the amount of the bill: as there was nothing in the facts or practice to shew that the payment of the bill by L. & Co. under the circumstances was merely provisional, and subject to revocation provided notice was given before the final closing of the accounts at four o'clock.

CASE stated by consent.

1—3. The plaintiffs are corn merchants, carrying on business in partnership at Newcastle-upon-Tyne. The defendants have a

1871

POLLARD v. BANK OF ENGLAND.

branch bank at Newcastle-upon-Tyne; and the plaintiffs, in the month of December, 1867, had for some years kept a banking account with the defendants as customers at the branch bank.

4. Messrs. Hopper & Son are millers, carrying on business at Gateshead, and in December, 1867, kept a banking account, with Messrs. Lambton & Co., bankers, at Newcastle-upon-Tyne.

5. On the 30th of January, 1868, the branch bank of the Bank of England at Newcastle discounted for the plaintiffs, as such customers, a bill of exchange for 219*l.* 15*s.*, drawn by the plaintiffs upon Messrs. Hopper, and payable to the plaintiffs' order, and accepted by Messrs. Hopper, and indorsed by the plaintiffs; and the amount of the bill, less the charge of 7*s.* 7*d.* for discount, was placed by the defendants to the credit of the plaintiffs in their banking account.

6. Messrs. Lambton and other bankers in Newcastle keep accounts with the branch bank of the Bank of England at Newcastle, and it has been the practice of Messrs. Lambton and the other bankers to send in, about 1 P.M. each day, to the branch bank of the Bank of England all cheques that have been delivered to them by their customers and drawn upon one of the other bankers at Newcastle; and these cheques are presented by the branch Bank of England, about 2 o'clock, to the drawees, the total amount ascertained, and a cheque upon the branch Bank of England given by the drawees for the amount, which is then placed to the debit of their account with the branch Bank of England.

7. It is the practice amongst these bankers at Newcastle, when one banker holds a bill of exchange which is payable at another banker's, to present it early in the day at the bank where it is payable, for the purpose of ascertaining whether it is in order for payment and will be paid; and if the bill is in order and will be paid, it is the practice for the banker at whose bank it is payable to initial or mark it, and return it to the banker who holds it, who then hands it over with the cheques in the manner above mentioned to the defendants' branch bank, for collection in the same way as the cheques; and when the defendants' branch bank are themselves the holders of a bill, they present it in the same way earlier in the morning, in order to see that it is in order for pay-

ment and whether it will be paid; and if it is in order and will be paid, it is left with the banker upon whom it is drawn, and a credit-note is received in exchange, and afterwards, upon the presentment of the cheques in the manner above stated, this credit-note is admitted into the calculation and forms part of the sum for which the cheque is given.

8. On the morning of the day upon which it became due, viz., the 24th of February, the bill for 219*l.* 15*s.* was taken by a clerk of the branch Bank of England in accordance with the usual practice to the banking house of Messrs. Lambton; and, upon presentation, the bill was, in accordance with the above-mentioned practice, marked by the Messrs. Lambton for payment, and a credit-note was given, indicating that it, with other moneys, was in order for payment and would be paid, of which the following is a copy:—

"Credit Branch Bank. Newcastle-upon-Tyne, Feb. 24, 1868.

"Exchange Account. 497*l.* 16*s.* 10*d.*

"£497 16*s.* 10*d.* For Lambton & Co.

"(Signed) Thos. Johnson."

9. Upon the afternoon of the same day, about 2 P.M., the clerk of the branch Bank of England took all the cheques drawn on Messrs. Lambton to their bank, together with the said credit-note, which was admitted into the total amount, and a cheque upon the branch bank was handed by Messrs. Lambton to the clerk for the amount of the balance due to the defendants.

10. The banks at Newcastle close to the public at 3 o'clock P.M. For the purposes of business between the branch bank and the bankers at Newcastle who keep accounts with them, the branch bank keeps open after that hour, and until about 4 o'clock, when it closes for the day. It is the practice, and was so for many years before 1867, for those bankers to attend at the branch bank between those hours for the purpose of having the day's accounts between them and the branch bank investigated, and of rectifying any mistakes and errors of any kind that may have arisen in the course of the day, and of finding and striking the final balances between them. All mistakes and errors made in the course of the day are subject to correction during that investigation.

11. After the closing of Messrs. Lambton's bank on the said 24th of February, the clerk who had given the credit-note, in-

1871

POLLARD v. BANK OF ENGLAND.

cluding the said bill, was informed by their ledger keeper of that of which he was not aware at the time, namely, that Messrs. Hopper, at the time the said bill was presented, had only a credit balance of 30*l.*, and the further fact was also for the first time ascertained, that, at the same time, Messrs. Hopper had stopped payment. Thereupon Messrs. Lambton's out-teller at once proceeded, at 3.30 P.M., to the branch Bank of England, and declared that the said bill of exchange had been paid by Messrs. Lambton in error, and requested the branch bank to take back the bill. The branch bank, however, declined to take back the bill unconditionally, but expressed their willingness to take it back under protest, and with a reservation of any right they might have acquired under the circumstances; and thereupon the bill was returned to and received by them under protest.

12. At the time when the out-teller requested the branch bank to take back the bill, the amount thereof had already been placed to the debit of Messrs. Lambton in the banking account kept by Messrs. Lambton at the branch bank.

13 and 14, shewed the items of account in detail, the balance being on the credit side of Messrs. Lambton's account.

15. If the true state of facts had been known by Messrs. Lambton's cashier at the time of the marking of the bill it would not have been marked, nor would a credit-note have been given in exchange for it; and when the cheque was given at about 2 o'clock it would not have been given if the true state of facts had been known. If the mistake had been discovered at any earlier period of the day the plaintiffs would have been in no better position.

16. The plaintiffs were in good credit with the defendants at the time, and had a balance in the defendants' hands far exceeding the amount of the bill; and the defendants, in making up their accounts with the plaintiffs to the close of the said 24th of February, treated the bill as having been dishonoured, and passed the amount thereof to the debit of the plaintiffs' account, in precisely the same manner as if the bill had been refused payment when presented; and the defendants also gave the plaintiffs due notice of dishonour.

17. Neither the defendants nor the plaintiffs sustained any damage or prejudice by reason of the mistake of Messrs. Lambton.

The question for the opinion of the Court was, whether the

plaintiffs are entitled to have credit with the defendants for the amount of the bill of exchange.

June 2 and 6. *Quain, Q.C.* (*Lewers* with him), for the plaintiffs. *Watkin Williams*, for the defendants.

The nature of the arguments appear from the judgment.

The following cases were cited: *Chambers* v. *Miller* (1); *Thompson* v. *Giles* (2); *Gillard* v. *Wise* (3); *Warwick* v. *Rogers* (4); *Aiken* v. *Short* (5).

Cur. adv. vult.

July 6. The judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.) was delivered by

BLACKBURN, J. In this case the plaintiffs were drawers of a bill of exchange, accepted payable at Lambton & Co., bankers, Newcastle. The bill had been discounted by the Newcastle branch of the Bank of England; and the question raised is, whether the Bank of England are entitled to debit the plaintiffs with the amount as being a dishonoured bill; and that depends upon the further question, whether what took place at Newcastle amounted to payment of the bill by Lambton & Co. to the defendants, or was merely an expression of an intention to pay the bill revocable and revoked.

Bankers in London, for the sake of economy of cash payments, have established a clearing-house, the details of the practice of which (so far at least as was material to the point then in question) are stated in the special verdict in *Warwick* v. *Rogers*. (4) The number of bankers and the quantity of business in Newcastle are far less than in London, and apparently are not sufficient to make it worth their while to have such an elaborate arrangement; but many of the objects of the clearing-house are effected by an arrangement (described in the case) by which all the Newcastle bankers have accounts at the branch Bank of England there, and use it as the means of making all payments between each other.

The case is not very lucidly stated, and there was some controversy between the counsel at the bar as to what it really meant.

(1) 13 C. B. (N.S.) 125; 32 L. J. (C.P.) 30.
(2) 2 B. & C. 422.
(3) 5 B. & C. 134.
(4) 5 Man. & G. 340.
(5) 1 H. & N. 210; 25 L. J. (Ex.) 321.

1871

POLLARD v. BANK OF ENGLAND.

It is stated in par. 6 that the bankers send all cheques of which they are holders, drawn upon other bankers, to the Bank of England for collection; and the statement in the case then proceeds thus: "These cheques are presented by the branch Bank of England about two o'clock upon the drawees, the total amount ascertained, and a cheque upon the branch Bank of England given by the drawees for the amount, which is then placed to the debit of their account with the Bank of England." We infer, though it is not stated, that cheques which the Bank of England hold in their own right are treated in the same way, and also, from what is afterwards stated, that bills initialed in the manner stated afterwards, and the credit-notes on the exchange account afterwards mentioned, are treated in the same way, and that the "total amount that is ascertained" includes the cheques on that banker, designated in the case as the drawee, which the Bank of England holds, as collector for the other bankers, the cheques on him which it holds in its own right, the bills initialed by him, and the credit-notes given by him; and that the cheque on the Bank of England which is then given is for the aggregate amount of those four sums, and not merely for the amount of the cheques given to the Bank of England by other bankers for collection; but this, though a material part of the case, is not clearly expressed, and was controverted.

The case then proceeds, in par. 7: Any one of the bankers, not being the Bank of England, who has a bill made payable at another bankers, sends it down in the morning to that banker, to see if it is in order and will be paid, and if it is, the banker at whose house it is payable initials it and returns it to the banker who is the holder; the bills thus initialed are sent by the holder to the Bank of England for collection in the same manner as cheques. No question in the present case arises as to the effect of initialing a bill, and returning it so initialed to the holder, the present bill having been held by the Bank of England itself, and not by one of the other bankers. When the Bank of England itself holds the bill, the practice is that the bill is left with the bankers at whose house it is domiciled, and a credit-note is given to the Bank of England. This credit-note is also treated by the Bank of England in the same manner as cheques.

The case then proceeeds to state that the bill in question was taken on the morning it became due to Messrs. Lambton, and upon presentation was, in accordance with the above practice, marked by Messrs. Lambton for payment, and that a credit-note was given indicating that it, with other moneys, was in order for payment and would be paid, of which the following is a copy:—

"Newcastle-upon-Tyne, Feb. 24, 1868.

"Credit Branch Bank. Four hundred and ninety-seven pounds sixteen shillings and ten pence.

"497*l.* 16*s.* 10*d.* For Lambton & Co.

"Thomas Johnson."

From this statement it may be inferred that bills held by the Bank of England are initialed in the same way as those held by other bankers; but in the view we take of the case it is not material whether this is so or not.

The case, then, in par. 9, states that "upon the afternoon of the same day, namely, about 2 P.M., the clerk of the branch Bank of England took all the cheques drawn on Messrs. Lambton to their bank, together with the credit-note, which was admitted into the total amount; and a cheque upon the branch bank was handed by Messrs. Lambton to the clerk for the amount of the balance due to the defendants."

It would seem that the word "balance" is used here in the sense of aggregate of the cheques, initialed bills, and credit-notes, and not as indicating that a further account was struck, in which credit was given to Lambton & Co. for any cheques or bills payable by the Bank of England of which Lambton & Co. were holders; but this is not clearly stated, and it was in controversy at the bar what was meant. It does not, however, seem important to ascertain this, for it is explicitly stated that the cheque was given for an amount which included the credit-note representing this bill inter alia.

After the banks had closed to the public, which is at three o'clock, Messrs. Lambton, for the first time, ascertained that the acceptors of the bill had stopped payment, and that the balance at their credit with them was not sufficient to meet this bill. Of course, if they had known earlier that they had stopped payment they would never have done what they did, and if what they had done was still revocable, they would have revoked it. They im-

1871

POLLARD v. BANK OF ENGLAND.

mediately gave notice to the branch bank that they had paid the bill in error, and required them to take it back. This was done before four o'clock, but after their account was already debited with the amount in the accounts of the Bank of England.

The question in the cause is, whether they still had the right to do this. If the bill was already paid, they clearly had not. If what took place amounted to no more than an arrangement amongst the bankers by which, for convenience sake, they at three o'clock stated the account of what they at that time intended to pay at the later hour of four, but only provisionally, so that the intention was revocable up to the time of actual payment, it would be otherwise; and if, instead of giving a cheque for the amount, the banker had given a credit-note, expressing that their account was to be debited provisionally with this amount, but subject to alteration and revocation at their pleasure up to a later hour, it would have clearly indicated that there was such an arrangement. But a cheque given purports to be, primâ facie, an absolute payment, and it would require very strong evidence to shew that it was not so.

The defendants contend that the 10th paragraph of the case shews that the giving of the cheque had no more effect than a credit-note to the effect suggested would have had. That paragraph is in the following terms: "The banks at Newcastle close to the public at 3 o'clock P.M. For the purposes of business between the branch bank and the bankers at Newcastle who keep accounts with them, the branch bank remains open after that hour, and until about four o'clock, when it closes for the day. It is the practice, and was so for many years before 1867, for those bankers to attend at the branch bank between those hours for the purpose of having the day's accounts between them and the branch bank investigated, and of rectifying any mistakes and errors of any kind that may have arisen in the course of the day, and of finding and striking the final balances between them. All mistakes and errors made in the course of the day are subject to correction during that investigation." We cannot think that this statement has the effect attributed to it by the argument of the defendants' counsel. Where money has been paid under a mistake of fact to an agent, it may be recovered back from that agent, unless he has in the mean time paid it to his principal, or done something equivalent to payment

to him, in which case the recourse of the party who has paid the money is against the principal only: See Story on Agency, s. 300; *Cox* v. *Prentice* (1); *Holland* v. *Russell*. (2) It would obviously be of great importance to a banker, who had by mistake paid money, to be entitled to demand it back from the Bank of England, instead of being obliged to have recourse against the customer of that bank; and full effect is given to all that is stated in par. 10, by supposing the arrangement among the bankers to be, that the Bank of England shall not alter its position by paying over the money to its customer, or doing anything equivalent to payment to him before four o'clock. But in the present case the payment, if it was one, was not made under such circumstances as would entitle the bankers Lambton & Co. to recover it back: see *Chambers* v. *Miller*. (3) It is necessary for the defendants to go so far as to maintain that the stating of the account between Messrs. Lambton and the Bank of England, the drawing by Lambton & Co. of a cheque on the Bank of England for the amount, and giving it to the Bank of England, and the placing of that cheque by the Bank of England to the debit of Messrs. Lambton, as if they had honoured it, were all merely pro formâ transactions at the pleasure of Lambton & Co., provided they gave notice of that revocation before four o'clock. We cannot think that the statement in par. 10 justifies us in coming to such a conclusion.

The matter may, therefore, be shortly put thus:—The bill having been presented by the defendants at Lambton & Co.'s, a cheque on the defendants themselves was given by Lambton & Co., who had funds in the defendants' hands to cover the amount. Thereupon, unless the giving the cheque was provisional and subject to ratification in going over the accounts later in the day, it became the duty of the defendants at once to transfer the amount of the bill from the account of Lambton & Co. to that of the plaintiffs; and this they, in effect, did. Such a transaction might, no doubt, by arrangement between the bankers, be provisional only, and subject to be set aside; but it is for the defendants to shew that such an arrangement existed, in order to divest the transaction of what would otherwise be its necessary effect. This the defendants

(1) 3 M. & S. 344. (2) 1 B. & S. 424: 30 L. J. (Q.B.) 308.
(3) 13 C. B. (N.S.) 125; 32 L. J. (C.P.) 30.

1871

POLLARD v. BANK OF ENGLAND.

have failed to do; and our judgment must, therefore, be for the plaintiffs.

Judgment for the plaintiffs.

Attorney for plaintiffs: *E. D. Welford.*
Attorneys for defendants: *Freshfields.*

May 27.

NICHOLSON, APPELLANT; WILLIAMS, RESPONDENT.

Port, within 54 Geo. 3, c. 159, s. 14—25 & 26 Vict. c. 69, s. 16—Board of Trade, Order of, prohibiting the taking of Shingle—Power of Commissioners of Treasury to annul the limits of an old Port and erect a new Port under 9 & 10 Vict. c. 102, s. 14, 15, and 16 & 17 Vict. c. 107, s. 9.

By 54 Geo. 3, c. 159, s. 14, it is enacted that in order to prevent damage being done to the shores of the ports, harbours, and havens in this kingdom, no person shall take any ballast or shingle from the shores or banks of any port, harbour, or haven of the kingdom from which the commissioners for executing the office of Lord High Admiral shall find it necessary for the protection of such port, harbour, or haven, or the works thereof, by order to prohibit the taking. By 25 & 26 Vict. c. 69, s. 16, the powers vested in the Admiralty are transferred to the Board of Trade.

The Board of Trade, on the 1st of August, 1868, made an order for the protection of the harbour of the river Humber, and prohibited the taking of shingle from the shore at Spurn Point from the Low Lighthouse southward to the extreme of the point at low water, and northward two and a half statute miles on both sides of the Spurn Point. A second order was made on the 6th of September, 1869, which, after reciting the first order for the protection of the port of Kingston-upon-Hull, prohibited the taking of shingle from the shores of the said harbour, or from the shores of the port of Kingston-upon-Hull, and the works thereof, between the northernmost boundary of the parish of Hornsea and the limits north of Spurn Point defined by the first order.

The appellant was convicted of taking shingle, not upon any portion of the shores or banks of that which is popularly known or which would be geographically described as the harbour of the Humber, or port of Kingston-upon-Hull, but upon a part of the coast to the north of Spurn Point and lying between Spurn and Hornsea. This was not part of the port of Kingston-upon-Hull or of the harbour of the Humber at the time of the passing of 54 Geo. 3, c. 159, but it was, at the date of the offence, within the limits of the port of Kingston-upon-Hull, as those limits were defined by an order of the Commissioners of the Treasury made in 1848. By that order, made under 9 & 10 Vict. c. 102, the port of Bridlington was annulled, and the coast from Spurn Point to Flamborough Head, which had formerly been assigned to the port of Bridlington, and which was then within the limits of that port, was transferred to, and directed to form part of, the port of Hull:—

1871

NICHOLSON v. WILLIAMS.

Held, that the order of the Treasury annulling the port of Bridlington, and assigning the limits of that port to the port of Hull, was not confined to revenue purposes; and that these extended limits formed part of a port within the meaning of 54 Geo. 3. c. 159; that, therefore, the orders of the Board of Trade were valid, and the appellant was rightly convicted.

CASE stated by a police magistrate of Kingston-upon-Hull under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant under s. 14 of 54 Geo. 3. c. 159, charging for that he the appellant did, on the 11th of April, 1870, at the parish of Owthorn, in the county of York, unlawfully take shingle from the shores or banks, or from a portion of the shores or banks of the port of Kingston-upon-Hull, whereby the said port was and is in danger of being damaged, contrary to 54 Geo. 3, c. 159.

The appellant was convicted of the offence.

The offence was committed on the seashore at Withernsea, being a village about fifteen miles to the north of the Spurn Point, and several miles south of Flamborough Head, and lying also between Spurn and a village called Hornsea.

On the 1st of August, 1868, the Board of Trade issued an order which, after reciting 54 Geo. 3. c. 159, prohibited the removal of shingle "from the shore or banks or any portion of the shore or banks at Spurn Point from the Low Lighthouse southward to the extreme of the point at low water, and northward two and a half statute miles on both sides of the Spurn Point." In July, 1869, proceedings were taken by the board against several parties for infractions of this order at a place called Kilnsea, two miles from Spurn Point, and they pleaded guilty, the result being that the practice of taking shingle within the limits defined by the order was stopped.

After the proceedings in July, 1869, the Board of Trade, on the 6th of September, 1869, issued a second order, which, after reciting the first order, prohibited the removal of shingle or ballast from the shores and banks of the port of Kingston-upon-Hull, and the creeks thereof, between the northernmost boundary of the parish of Hornsea and the limits north of Spurn Point defined by the order of the 1st of August, 1868. (1)

(1) Copies of the orders were attached to the case, and they are given more fully in the judgment of the Court.

1871

NICHOLSON v. WILLIAMS.

The prohibition contained in this second order of the Board of Trade seems to have been the means of stopping the removal of shingle within the extended limits up to the 11th April last; but on that day the appellant, by the direction of Sir Clifford Constable, removed shingle from the shore near Withernsea, a previous intimation that he would do so having been sent to the Board of Trade by Sir Clifford Constable's solicitor.

The removal of the shingle was admitted, and it was proved that such removal, if unrestricted, from Hornsea to Kilnsea, must, by endangering the lighthouses at Spurn and the navigation and harbourage in the Humber, in the Hank Roads, and under Sunk Island, be injurious to the last degree to the port of Hull, assuming that such port (as alleged on the part of the Board of Trade) should be found to extend from Trent Falls to Flamborough Head.

In support of his argument as to the extent of the port of Hull, and the incidents of such port, Mr. O'Dowd, who appeared on behalf of the Board of Trade, quoted from Lord Hale's treatise, 'De Portibus Maris;' also from Jerwood's 'Dissertation on the Right to the Seashore and to the Soil and Beds of Tidal Harbours and Navigable Rivers;' Selden's 'Mare Clausum, seu de Dominis Maris;' Callis on Sewers; shewing the modes in former times of creating ports, &c., and the changes that have taken place in such modes; and he also traced—by reference to Bracton (lib. 1, cap. 12, sec. 6), Craig, 'Jus Feudale,' lib. 1, dig. 15, s. 17, Sheppard in his abridgment of the Common and Statute Law of England, *Dickens* v. *Shawe*, as quoted in Hall's treatise on Foreshore, and various other authorities—the extent to which the Crown (or, through the Crown, a subject) can possess rights in our ports, shores, &c., with a view of shewing that public rights (such as the right to protection for our ports, harbours, or havens) cannot be alienated by the Crown, and that the Crown cannot vest in a subject, even by the most express donative grant, a power to do a public wrong, which it has no prerogative to exercise itself. Mr. O'Dowd adopted, inter alia, the argument of Callis in his book on Sewers, who says: "The use of the sea-banks is common to all the king's liege people; and as the owner and proprietor of the grounds cannot justify the digging or casting of them down, whereby the people shall be deprived of the necessary use thereof, no more can the people,

which have but necessarium usum, dig ballast there; but everyone, as well owner as user, must sic uti suo ut alienum non lœdat;" and quoted various other authorities to shew that no one can legally remove shingle from the shore, so as to commit an injury to any port, harbour, or haven under any pretext whatsoever.

Mr. O'Dowd next proceeded to the Acts, orders, &c., of more modern date, which authorize the Board of Trade to proceed against parties removing shingle from the coast at Withernsea; and he submitted that the mode by which a port can now be created, and the only mode, is under the provisions of an Act commonly called the Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107) s. 9. Under that Act (s. 9) the Treasury may, by their warrant, "appoint any port or sub-port in the United Kingdom, and declare the limits thereof, and appoint proper places within the same to be legal quays for the lading and unlading of goods, and declare the bounds and extent of any such quays, or annul the limits of any port, sub-port, haven, creek, or legal quay already appointed, or to be hereafter set out and appointed, and declare the same to be no longer a port, sub-port, haven, creek, or legal quay . . . or alter and vary the names, bounds, and limits thereof . . ."

Mr. O'Dowd then contended that, under the powers of this Act (1), Hull was appointed a port by the Treasury, as appears by the *Gazette* of the 17th of March, 1848 (1), and that such port

(1) *London Gazette*, 17th of March, 1848: "Whereas, by virtue of a commission issued out of the Court of Exchequer in the fourth year of the reign of George II., the bounds and limits of the port of Bridlington were declared to extend and be accounted from the promontory or point called Spurn Head all around the said head northward to the most easterly point of Flamborough Head, including all the sea-coast and to fourteen fathoms water from low-water mark, together with bays, creeks, rivers, inlets, and streams between the said Spurn Point and the most easterly point of Flamborough Head. And whereas the trade and business at Bridlington have become so trifling as no longer to warrant the continuance of that place as an independent port, we, being three of the Lords Commissioners of her Majesty's Treasury, do hereby, under 9 & 10 Vict. c. 102, annul the limits of the said port of Bridlington as set out by virtue of the said commission, and have included the same within the limits of the port of Hull, as hereinafter set out; and we do hereby declare the said port of Bridlington to be no longer a port. And we do hereby, under the said Act, appoint Boston, Grimsby, and Hull to be ports in that part of the United Kingdom called England; and we do hereby declare that . . . the limits of the port of Hull shall commence at the confluence of the rivers Trent and Ouse with the river Humber, and include the whole of

1871

NICHOLSON v. WILLIAMS.

commences at the confluence of the Trent and Ouse, and extends to Spurn Point, at the entrance of the Humber, and from thence northerly along the coast of Yorkshire to Flamborough Head.

The 54 Geo. 3, c. 159, s. 14, which creates the offence alleged to have been committed by the appellant, enacts: "That, in order to prevent damage being done to the shores or banks of the ports, harbours, or havens of the kingdom, no person shall take ballast or shingle from the shores or banks, or any portion of the shores or banks, of any port, harbour, or haven of this kingdom from which the commissioners for executing the office of Lord High Admiral shall find it necessary, for the protection of such port, harbour, or haven, or the works thereof, by order published in the *Gazette*, to prohibit the taking or removing of such shingle or ballast upon pain of forfeiting 10*l.* for every such offence."

By the Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), s. 16, it is enacted, that from and after the 31st of December, 1862, ss. 14 and 16 of 54 Geo. 3, c. 159, and all provisions relative thereto, shall be read and construed as if the Board of Trade were named in the said sections instead of the Admiralty.

In pursuance of the powers thus conferred upon them, the Board of Trade issued the two orders already referred to; for the breach of the observance of the second of these orders the proceedings against the appellant have been taken.

In reply to the case for the prosecution, Mr. Kemplay, who appeared for the apellant, admitted that if the Board of Trade had power to make an order that will include Withernsea, the

---

the said river to a supposed straight line drawn from Skitterness, on the Lincolnshire bank, to Paull Lighthouse, on the Yorkshire bank of the said river Humber; and the said limits shall continue, at low-water mark at spring tides, along the Yorkshire bank of the said river Humber, from the said Paull Lighthouse to Spurn Point, at the entrance of the said river, and from thence northerly along the coast of Yorkshire to Flamborough Head, being the southern limits of the said port of Scarborough, in the said county. And we do further declare, that the limits seaward of the said several ports shall extend to a distance of three miles from low-water mark out to sea, and that the limits of such ports shall include all islands, bays, harbours, rivers, and creeks within the same respectively."

It is to be observed that the order was made, not under 16 & 17 Vict. c. 107, but under 9 & 10 Vict. c. 102 (now repealed by the above Act); ss. 14 & 15, however, are in the same terms as s. 9 of 16 & 17 Vict. c. 107.

appellant must be convicted; but contended that the port of Hull, alleged by the prosecution to extend from Trent Falls to Flamborough Head, and thus or otherwise to include Withernsea, is only a port for customs purposes, and not a port within the meaning of s. 14 of 54 Geo. 3, c. 159, and that that statute applies only to ports as defined by Lord Hale. The only case referred to by Mr. Kemplay in support of this argument was the *Hull Dock Co.* v. *Browne* (1), noticed in the subsequent case of *Beilby* v. *Raper* (2); but upon examining those cases, they did not appear to the magistrate to lead to the conclusions Mr. Kemplay was contending for.

The magistrate found that he could not come to the conclusion that the port of Hull can only be said to include the coast near Withernsea for customs purposes, so as to exclude that part of the coast from the protection of 54 Geo. 3, c. 159, s. 14; or that the Act of 1853 (16 & 17 Vict. c. 107) indicates any intention to circumscribe the ports created under its provisions to merely revenue purposes, or in any manner whatsoever; but, on the contrary, the ports referred to would seem to be capable of limitation only in accordance with the terms of the order creating them: nor did he find in the order, by the Lords of the Treasury, of 1848 any words circumscribing the creation of the port of Hull so as to limit its provisions to merely revenue purposes.

It is not a fact that the duties of the Customs in reference to the port of Hull (using that term in the extended sense contended for by the Board of Trade) are limited to revenue purposes; for the Customs have jurisdiction over the port of Hull as thus extended for various purposes wholly independent of revenue, such as cases of stranding, registry of vessels, &c., &c., being the ordinary agents of the Board of Trade in matters not belonging to the Customs as a revenue department.

It was not suggested by the appellant that there is any other mode of creating a port in the present day than that adopted as to the port of Hull under the order of 1848; and it was not shewn by evidence or otherwise that there is, or ever was, a port of Hull in accordance with the definition of Lord Hale, though it would seem from the case referred to by Mr. Kemplay that there

(1) 2 B. & Ad. 43. (2) 3 B. & Ad. 284.

1871

NICHOLSON v. WILLIAMS.

was formerly a port of Sayer Creek, which was sometimes called the port of Hull. No reasons were adduced by the appellant for contracting materially the benefits to be derived from 54 Geo. 3, c. 159, s. 14, though such a result must follow if that Act is confined to such ports only as come literally within the definitions contained in Lord Hale's work.

The question for the opinion of this Court was, whether the orders of the Board of Trade bearing date the 1st of August, 1868, and the 6th of September, 1869, were valid in point of law.

April 22, and May 3. *Sir J. B. Karslake, Q.C.* (*Kemplay* with him), for the appellant.

Sir R. P. Collier, A.G. (*Beasley* with him), for the respondent.

The statutes mentioned in the argument are commented on in the judgment. The following cases and authorities were cited: Hale De Portibus Maris (Hargrave's Law Tracts, pp. 46, 47, 50); Callis on Sewers, p. 58; Hamel's Laws of the Customs, p. 77; *Mayor of Exeter* v. *Warren* (1); *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (2)

Cur. adv. vult.

May 27. The judgment of the Court (Mellor, Lush, and Hannen, JJ.) was delivered by

LUSH, J. The question submitted to us by the case is, whether two orders of the Board of Trade, dated the 1st of August, 1868, and the 6th of September, 1869, are valid in point of law.

The first of these orders, after reciting that the board had found it necessary for the protection of the harbour or haven of the river Humber, and of the shores and banks thereof, and of the works thereof, to prohibit the taking or removing of any shingle or ballast from the shore or bank thereinafter specified, prohibited "all persons from taking or removing any description of shingle or ballast from the shore or banks, or from any portion of the shore or banks, at Spurn Point from the low lighthouse, southward to the extreme of the point at low-water, and northward two and a half statute miles on both sides of the Spurn Point."

The second order, after reciting the first, and that for the further

(1) 5 Q. B. 773. (2) Law Rep. 3 Ex. 330.

protection of the said harbour, haven, or port, and also for the protection of the shores and banks of the port of Kingston-upon-Hull, and of the works thereof, the Board of Trade had found it necessary to extend the limits mentioned therein, went on to prohibit the taking of shingle or ballast from the shore or banks, or from any portion of the shore or banks, of the said harbour or haven, or from the shores and banks of the port of Kingston-upon-Hull, and the works thereof, between the northernmost boundary of the parish of Hornsea and the limits north of Spurn Point defined by the order of the 1st of August, 1868.

These orders were professedly founded on the statute 54 Geo. 3, c. 159, s. 14, by which it is enacted, that "in order to prevent damage being done to the shores or banks of the ports, harbours, or havens in this kingdom, no person or persons shall take any ballast or shingle from the shores or banks, or any portion of the shores or banks, of any port, harbour, or haven of this kingdom, from which the commissioners for executing the office of Lord High-Admiral of the United Kingdom for the time being shall find it necessary for the protection of such port, harbour, or haven, or the works thereof, by order under their hands, &c., to prohibit the taking or removing of such shingle or ballast upon pain of forfeiting for every such offence the sum of 10*l*."

By 25 & 26 Vict. c. 69, s. 16, the powers vested in the Commissioners of the Admiralty by this section were transferred to the Board of Trade.

The place where the shingle was taken by the appellant, and for which taking he was convicted, is not upon any portion of the shore or banks of that which is popularly known, or which would be geographically described, as the harbour or haven of the Humber, or the port of Kingston-upon-Hull, but upon a part of the coast fifteen miles to the north of Spurn Point, and lying between Spurn and a village called Hornsea. This was not in any sense part of the port of Kingston-upon-Hull, or of the haven of the Humber, at the time of the passing of 54 Geo. 3; but it was, at the date of the offence, within the limits of the port of Kingston-upon-Hull, as these limits were appointed and defined by an order of the Commissioners of the Treasury made in 1848, and published in the *London Gazette* on the 17th of March in that year. By that

1871

NICHOLSON v. WILLIAMS.

order, made under 9 & 10 Vict. c. 102, the coast from Spurn Point to Flamborough Head, which in the fourth year of George II. had been assigned to the port of Bridlington, and which at the passing of 54 Geo. 3 was within the limits of that port, was transferred to, and directed to form part of, the port of Hull.

On behalf of the appellant it was contended that the powers of the Board of Trade under 54 Geo. 3, c. 159, s. 14, are confined to what is geographically within and part of the port or haven, and which is popularly known as such, or, at all events, as regards this case, to so much of the shore as formed part of the port of Hull at the time when the Act passed.

The title of the Act is, "An Act for the better regulation of the several ports, harbours, roadsteads, sounds, channels, bays, and navigable rivers in the United Kingdom; and of His Majesty's docks, dockyards, arsenals, wharfs, moorings, &c." And it contains various enactments, some of which apply to the whole coasts of the kingdom, others only to places frequented by ships for the purpose of loading and discharging. The two sections immediately preceding the 14th belong to the former class. They prohibit the unlading on any part of the shore, except at a wharf constructed for the purpose, of any ballast, stone, gravel, &c., except at or within two hours before or two hours after high-water, and the depositing of such matters at any time below low-water mark at neap tides, &c. Section 14 belongs to the latter class, and applies only to ports, harbours, and havens, its object being to prevent disturbance of the shore at these places of resort for shipping, which might result in injury to the navigation, and consequent detriment to commerce.

It is therefore clear that the jurisdiction of the Board of Trade to prohibit the taking of shingle extends not over the whole of the coast of the kingdom, but only over such portions thereof as are within the ambit of a port, harbour, or haven. Whatever is done beyond those limits is left to be dealt with at common law, but within those limits the jurisdiction of the Board to prohibit the public from taking shingle or ballast is absolute and without appeal. What may be the meaning and operation of the saving clause, s. 28, it is unnecessary to consider, because the defendant did not bring himself within its provisions.

On the other hand, it is equally clear that their jurisdiction is not limited to ports or havens for which regulations have been made under the earlier sections of the Act. The enactment applies, as the object and purpose of it require that it should apply, to "any" and every port, harbour, and haven in the kingdom.

Ports and havens are not merely geographical expressions; they are places appointed by the Crown "for persons and merchandises to pass into and out of the realm," and at such places only is it lawful for ships to load and discharge cargo. The assignment of such places to be "the inlets and gates" of the realm is, and always has been, a branch of the prerogative, resting, as Blackstone remarks (Bl. Com. vol. i. p. 263), partly upon a fiscal foundation in order to secure the king's marine revenue. Their limits and bounds are necessarily defined by the authority which creates them, and the area embraced within those limits constitute the port. Having once granted the franchise, the king had not at common law the power of resumption, or of narrowing and confining their limits when once established, but any person had a right to load and discharge his merchandise in any part of the haven, "whereby," as observed by Blackstone (1 Bl. Com. 264), "the revenue of the customs was much impaired and diminished by fraudulent loadings in obscure corners." This occasioned the statutes of 1 Eliz. c. 11, and 13 & 14 Car. 2, c. 11.

The latter statute (s. 14) enables the Crown by commission to "appoint all such further places, ports, members, and creeks (except the town of Hull) as shall be lawful for loading and discharging, lading or shipping, of any goods, wares, or merchandises within the kingdom of England," and to "set down and appoint the extents and limits of every port, haven, or creek within the kingdom, whereby the extents, limits, and privileges of every port, haven, or creek may be ascertained and known."

The town of Hull, which was a legal port, time out of mind, having been excepted out of the operation of this Act, a private Act was passed in the 14 Geo. 3 (c. 56) whereby His Majesty was empowered "to assign necessary places and quays at Kingston-upon-Hull, and to settle the extents and limits of the same;" and by 45 Geo. 3 (private) the rights and privileges which then belonged to the port of Kingston-upon-Hull were extended to new

1871

NICHOLSON v. WILLIAMS.

docks and basins then made, which were to be deemed and held to be part of the port: see *Hull Dock Co.* v. *Brown.* (1)

The Act of Charles II. remained in force down to the year 1825, when it was repealed together with a large number of other statutes relating to the customs, and a new Act passed (6 Geo. 4, c. 108, s. 135), whereby a similar power was given to appoint by commission out of the Court of Exchequer "any port, haven, or creek in the United Kingdom, and to set out the limits thereof;" but this section contained a proviso, in affirmance of the common law, that "all ports, havens, and creeks, and the respective limits thereof, and all legal quays appointed and set out, and existing as such, at the commencement of the Act, under any law till then in force, shall continue to be such ports, havens, creeks, limits, and legal quays respectively as if the same had been appointed under the Act." This provision was re-enacted in the subsequent Consolidation Acts (3 & 4 Wm. 4, c. 52, and 8 & 9 Vict. c. 86), and each contained the saving in favour of existing ports and quays.

But 9 & 10 Vict. c. 102, which dispensed with the commission out of the Exchequer, and vested the appointment of ports, sub-ports, and quays in the Commissioners of the Treasury, abrogated the right which existed at common law, and which had been preserved by all the previous Acts. Section 15 empowers the commissioners "to annul the limits of any port, sub-port, haven, creek, or legal quay, already set out or appointed, and to declare the same to be no longer a port, sub-port, haven, creek, or legal quay, or to alter or vary the names, bounds, and limits of any such port, sub-port, haven, creek, or quay." Section 16 requires the appointment, annulment, or alteration to be published in the *London Gazette.* It was under this statute that the order was made in 1848 annulling the port of Bridlington, and assigning the limits formerly of that port to the port of Hull.

From these considerations it appears to us to be beyond a doubt that the word "port" in 54 Geo. 3, c. 159, is used, not in a geographical, but in its legal and proper sense, as denoting a place to which ships were or should be authorized to resort for loading and discharging. Its object and purpose being the preservation and protection of these places from injury for the sake of shipping

(1) 2 B. & Ad. 43.

and commerce, it cannot have been meant to refer to places where ships are not allowed to resort, nor can it refer to the mere geographical limits of such places. Ports and havens are not bounded by such limits, but by limits arbitrarily defined by the authority by which the port is constituted. Bridlington, which was created a port under the Statute of Charles II., extended along this very line of coast at the time 54 Geo. 3, c. 159, was passed. Can it be said that this spot was not at that time a part of the "shore or bank" of the port of Bridlington? It had as a port no other limits than those which were assigned to it when it was created a port.

But it was further argued that, as Hull is an ancient port, and the power to vary its limits was given for customs purposes only, the limits of the port remained for all other purposes as they were at the time 54 Geo. 3 passed, and that the 14th section must be read as applying to the port as it existed at that time.

We cannot accede to this argument. It was for customs purposes that ports were at first instituted, and it is for such purposes they are allowed to retain their franchise; and although at common law the Crown could not revoke an appointment once made, it is clear that under 9 & 10 Vict. c. 102, the Crown had, and now, under 16 & 17 Vict. c. 107, has, the power to annul and take away the franchise from any port, whether it be an ancient port like Hull or a comparatively modern one like Bridlington. When this is done the place ceases to be a port, and 54 Geo. 3 no longer applies to it. If, instead of annulling the port, the commissioners were to contract its ancient limits, the port would consist of the area embraced within those new limits, and the coast outside, though formerly subject to, would no longer be within the jurisdiction of the Board of Trade. So if, instead of annulling or contracting, the commissioners extend the limits of the port, the parts newly taken in become as much a part of the port as was the part originally within it.

If the question were, whether a right to anchorage or other dues, claimable in the port as it existed before the order of 1848, is by virtue of that order extended over the new area, the case would be widely different. The answer, that the enlargement was made for customs purposes, and not to benefit the grantee of the dues, would be conclusive. But that has no bearing on the question we

1871

NICHOLSON v. WILLIAMS.

have to decide, which is, whether the extended limits form part of the port within the meaning of 54 Geo. 3, c. 159. For the reasons given, we are of opinion that they do, and that the "port" intended by that Act is the port as it is constituted for the time being by the order of the Commissioners of the Treasury. We therefore affirm the conviction.

Conviction affirmed.

Attorneys for appellant: *Brooksbank & Galland.*
Attorney for respondent: *Solicitor to Customs and Board of Trade.*

May 22.

WADHAM AND OTHERS *v.* THE POSTMASTER GENERAL.

Covenant to use Premises as Post-office, and for no other Purpose—Sale of Excise Licences for Men Servants, &c.

By a lease in 1852, premises were demised to the postmaster general for 1000 years, at the rent of one shilling, and the postmaster general covenanted that he and his successors would at all times during the term use the premises as a post-office for the district, and would not use the premises for any other purpose.

Ejectment having been brought on a proviso for re-entry for the breach of the above covenant, on the ground that the excise duties and licences for dogs, men servants, horses, &c., had been received and granted on the premises by the post-office clerks:—

Held, that there had been no breach of the covenant.

EJECTMENT for premises occupied as Clifton Post-office, being the ground-floor of 4, Regent Crescent, Clifton.

The action was on a proviso for re-entry for the breach of covenants in the lease under which the premises were held; the breach alleged (inter alia) being that the premises had been used for the sale and issue of stamps and licences, and as an office for the collection of the inland revenue since the 1st of January, 1870.

At the trial, before Willes, J., at the Bristol Summer Assizes, 1870, it appeared that the claimants' predecessor in title, John Carter, by lease of the 2nd December, 1852, demised the premises to the then postmaster general for 1000 years, at the yearly rent of one shilling.

There was a covenant by the lessee, that "the postmaster general, his successors or assigns, shall and will from time to time, and

at all times during the continuance of the said term, use the premises as a post-office for the parish and district of Clifton, and shall not use the same premises for any other purpose." There was also a covenant not to carry on certain trades, nor any noisy or offensive trade.

There was a proviso, that in case the postmaster general, his successors or assigns, shall in any wise fail or neglect in the performance of any or either of the covenants on his part to be performed, then it shall be lawful for the lessor, his heirs or assigns, to re-enter. There was also a proviso, that if at any time the postmaster general for the time being shall feel desirous or think proper to remove the post-office from the premises, and shall actually remove the business therefrom, then the lease shall cease and be absolutely void.

It was proved that since the 1st of January, 1870, the post-office clerks had issued and received payment for licences for men servants, horses, carriages, armorial bearings, &c., under 32 & 33 Vict. c. 14, and for dog licences under 30 Vict. c. 5. (1) It was admitted that at the time the lease was granted, money-orders were issued and paid by the post-office authorities, and postage stamps were also sold at the post-offices. (2)

The learned judge directed a verdict for the defendants, reserving leave to move to enter a verdict for the claimants.

A rule was obtained accordingly, on the ground that the premises were used for other than post-office purposes, by their being used for the receiving of duties of excise and the granting of excise licences.

(1) By 32 & 33 Vict. c. 14, after repealing by s. 16 the duties of assessed taxes, certain duties are granted by s. 18, on and after the 1st of January, 1870, on male servants, carriages, horses, armorial bearings, &c., to be paid annually on licences to be taken out under the Act: "And such duties and licences shall be excise duties and licences, and shall be under the management of the commissioners of inland revenue; . . . . and the said licences shall be in such form and shall be granted by such officer as the said commissioners shall direct." . . . .

By 30 Vict. c. 5, the duties of assessed taxes on dogs were repealed; and by ss. 3–5 fresh duties on licences for dogs were imposed, in precisely the same terms as above, except that the licences were to be granted "by such officers of inland revenue" as the commissioners should direct.

(2) Under 3 & 4 Vict. c. 96, and 11 & 12 Vict. c. 88, respectively.

1871

WADHAM v. POSTMASTER GENERAL.

Sir R. P. Collier, A.G., H. T. Cole, Q.C., J. J. Hooper, and *J. F. Collier*, shewed cause. There was no breach of the covenant not to use the premises for any other purpose than a post-office. The object of the parties in granting this lease must be looked to as well as the mere words of the covenant. The object of the grantor was clearly to improve the property in the particular neighbourhood by getting the post-office established there, and the intention of the covenant was to carry this object out by keeping the post-office there. At the time the lease was granted, the business of the post-office was not merely, as it once had been, the receipt and transmission of letters, but it included the sale of postage stamps and the granting and paying of money-orders. The additional business now objected to, the granting of these licences and receiving the money, is very analogous to the previous business of the post-office, and, though the duties are part of the inland revenue, yet they are received by the post-office servants under the direction of the postmaster general. Secondly, the proviso for re-entry does not apply to the breach of a negative covenant: *Doe* v. *Marchetti* (1), *West* v. *Dobb.* (2)

Edlin, Q.C., and *Petheram*, in support of the rule. It is impossible that the granting of the licences and the receipt of the duties, which are expressly made *excise* licences and duties, can be said to be carrying on the business of the post-office; the licences are, by the express terms of the statute, to be granted by such officer as the commissioners of inland revenue shall direct; the post-office clerks, therefore, in this business, are acting as officers of Inland Revenue, and not as post-office clerks. There is no analogy between this and the granting of post-office orders and the selling of postage stamps; those are both post-office purposes, and are so treated by the Acts of Parliament. To put it at the very lowest, these are new duties imposed upon the post-office, and parties must be taken to contract with a view to the state of the law existing at the time; and there must be a clear intention evidenced by the words used to shew that they contemplated to contract with reference to a change in the law: see per Pol-

(1) 1 B. & Ad. 715. (2) Law Rep. 5 Q. B. 460.

lock, C.B., and Maule, J., in *Mayor of Berwick* v. *Oswald* (1), cited in the judgment of the Court in *Bailey* v. *De Crespigny*. (2)

COCKBURN, C.J. I think this rule must be discharged. I quite agree that upon a covenant to carry on upon the premises no other business than the business of the post-office, it would not be competent to the government authorities to cause some business to be carried on altogether independent of the functions and duties of the postmaster general. That would have been a breach of the covenant. But when we come to consider how far what has been done is or is not a breach of the covenant, I think we must consider whether it is ejusdem generis with the duties of the post-office existing at the time the lease was granted. Now, there were at that time, besides the mere transmission and delivery of letters, other duties commonly performed through the medium of the post-office by the post-office servants, such, for instance, as the sale of postage stamps, and the granting, transmission, and payment of money-orders. What is now put forward as a breach of this covenant is something not exactly the same, but, as it strikes me, of a very analogous character, it is the granting and delivery of licences, which properly come from the Inland Revenue, it is true, and not from the post-office, but the delivery of which through the post-office is a matter of public convenience to the Inland Revenue and the government; and this is not so foreign to the general functions of the post-office as that it can be said to be the transfer of the business of one department to another. No doubt it is the business of the Inland Revenue to grant licences of this description; but it is a matter of public convenience that the licences should be delivered to the persons taking them out and paying for them through the post-office; therefore I do not see that there is such a plain manifest distinction between the discharging this function of the government and the other duties which have been before discharged by the post-office as should make this a breach of the covenant in question. Further, try it by this test: supposing the officers of the post-office, persons employed by the government, on being called upon to discharge this duty, had

(1) 2 E. & B. at pp. 679, 665; 23 L. J. (Q.B.) at pp. 331, 324.

(2) Law Rep. 4 Q. B. at p. 186.

1871

WADHAM v. POSTMASTER GENERAL.

declined to do it, and had, in consequence, thrown up their engagement, would they have been justified in so doing? I think it is within the scope of the power given in the Act of Parliament to the Inland Revenue to depute this duty to the postmaster general. Whether or not the postmaster general would have been justified in saying, "I decline to allow the post-office to be made the medium of sending these licences out," is another question. We know this is done with the sanction and by the authority of the postmaster general, and I do not think it is so foreign to the general functions of the post-office as that the issuing of these licences can be considered as a breach of the covenant.

BLACKBURN, J. I am of the same opinion. The covenant is, that the postmaster general shall use the premises demised as a post-office for Clifton, and not for any other purpose. First, I certainly think that, where there is a negative covenant, if the parties use apt words, and say, on the breach of such a covenant the lessors may have a right to re-enter, then, such a right of re-entry is to be upheld; but the difficulty generally arises, I apprehend, in consequence of the form of the proviso for re-entry. The case of *Doe* v. *Marchetti* (1) was decided upon that ground. The proviso was so worded there that the Court of Queen's Bench thought it did not apply to the negative covenant. But where the proviso for re-entry uses apt words, I think the power of re-entry may be just as well reserved for breaking a negative covenant as for not performing a positive covenant. But, passing by that, I agree with my Lord that, in the present case, the covenant is not broken. After the covenant, which is relied upon as being broken, there come several special covenants, of which, I dare say, the true explanation is, that they were put in because there were similar covenants in the original lease, and it was thought convenient to repeat them. Then there comes the general proviso for re-entry, and then a special proviso, "That if at any time the postmaster general shall remove the business of the post-office the lease shall be void;" I think that shews what was meant by the earlier covenant. The object was this: it seems the lease was granted for 1000 years, at a nominal rent, for the very purpose of bringing the post-office there, so as

(1) 1 B. & Ad. 715.

to induce persons to come and take building leases in the neighbourhood. The object was that the business of the post-office should be transferred there, and the covenant is merely that the postmaster general shall there transact the business of the post-office. Then, what was the business of the post-office? Clearly all that was then done under the postmaster general would be part of the post-office business; and, I think, as everybody must have supposed that there would be alterations in the functions of the post-office, there can be no doubt that the parties expected there would be alterations; and so long as the duties are analogous to those already performed, in addition, but of the same character, I think it is still the business of the post-office within the meaning I put on this covenant. The particular thing done is this, that certain licences are issued at the post-office, the duties on which the Inland Revenue are to collect, and they may direct any officer to issue them. The Inland Revenue have directed those acting in the post-office to issue the Inland Revenue licences, and to receive the money for them. Is that so different from and so unanalogous to the functions performed by the post-office at the time the lease was granted, as that we can fairly say it is not part of the duty of the post-office? I think the analogy is close to the selling of postage stamps and receiving the money for them, and a good deal analogous to the issuing of money-orders, and the transacting of the business of a banker in receiving money and forwarding it. Neither of these would be properly letter-carrying business, but both are parts of the business of the post-office; and I think the addition here, that the public may purchase a licence to keep a dog, a servant, or a horse, is not of so different a nature as to make it no part of the business of the post-office, and so to make it a breach of the covenant.

MELLOR, J. I am also of the same opinion. I think, in construing a covenant of this nature, that the postmaster general shall use the premises demised as a post-office for the district, and shall not use the premises for any other purpose, in order to ascertain what is the meaning of those words you must take into view what would be reasonably within the contemplation of the parties at the time the lease was granted, and the use at that time

1871

WADHAM v. POSTMASTER GENERAL.

made of the post-office as a place for transacting certain kinds of business; and "any other purpose" must mean any other purpose than those analogous to the purposes to which the post-office was at that time devoted. Afterwards this Act of Parliament was passed, which enables the Commissioners of Inland Revenue to have the duties of distributing these licences performed, and to direct in what form and in what manner they may be collected; and this duty they have delegated to the post-office by arrangement with the postmaster general. I cannot help thinking that these duties which are devolved on the officers of the post-office are strictly analogous to the other duties that have been referred to by my Lord and my Brother Blackburn, namely, the selling of stamps, and the granting and paying of money orders. When you consider what is the general effect of the whole lease, and the object of the parties, it cannot be reasonably said that the parties would consider such duties as these would be a breach of the covenant. The object was to induce the postmaster general to take these premises for the purpose of having therein performed all the functions which by the authority of parliament are to be performed by the ordinary post-office clerks; and these are ordinary post-office duties, because they become so by the effect of this general arrangement. If duties utterly inconsistent with the post-office work were to be thrown by any arrangement upon the post-office, it might amount to a breach of the covenant; but I am satisfied there is nothing here which, if the lessors had anticipated, would have made them other than extremely desirous of granting the lease, the object being to promote that sort of business which is a great convenience to the neighbourhood, and gives an increased value to the property.

HANNEN, J. I am of the same opinion. We have to determine what was the meaning of the parties to be collected from the language which they have used, and I think the meaning which we can collect from the language used is this, that the premises were to be used for the purpose of a post-office only, and that that would include the using of the premises for those purposes for which the post-office was, at the time of the entering into the covenant, used, and all other branches of business ejusdem generis with

1871

WADHAM v. POSTMASTER GENERAL.

those which were then carried on, and which might from time to time be imposed upon the post-office. Now, it appears to me that the issuing of the licences is peculiarly ejusdem generis with the issuing of money-orders; and it may be illustrated in this manner—that this business might be equally well carried on by means of the money-order system; for instance, if, instead of saying the dog licences shall be issued by the several post-offices, it had been said that the public might obtain their dog licences by remitting money through a post-office order, for which no fee should be charged, and if in return a dog licence had been sent from the Inland Revenue Office through the post-office, the same thing would have been done by a more roundabout mode, the same documents exactly would have been issued, and exactly the same result would have been obtained. This shews, as it seems to me, that the distribution of these licences is peculiarly analogous to the business carried on in the post-office. For these reasons, I concur in thinking that the rule should be discharged.

Rule discharged.

Attorneys for plaintiffs: *Smith, Guscotte, & Wadham, for Wadham, Bristol.*

Attorney for defendant: *Solicitor to Post-Office.*

1871
June 1, 10.

THE QUEEN, on the Prosecution of ROBERTS and Others, *v.* THE MAYOR AND TOWN COUNCIL OF SHEFFIELD.

Municipal Corporation—Application of Borough Fund—5 & 6 Wm. 4, *c.* 76, *s.* 92—7 *Wm.* 4 *& 1 Vict. c.* 78, *s.* 44—*Application for Certiorari—Practice.*

In the municipal borough of S. was a waterworks company, incorporated by Act of Parliament, which supplied the greater part of the borough with water. By this Act, the company, after a certain time, on the requisition of the town council, were bound to give a constant supply of water, and they were empowered to make regulations to be observed by the consumers, subject to the approval of two justices, any person aggrieved having the right to oppose the regulations before the justices. The town council having required the company to give a constant supply, the company proposed certain regulations, which were opposed before the justices by the corporation on the ground that they imposed too onerous conditions on the consumers; and the justices modified the regulations accordingly. The company also promoted a bill in parliament to obtain further time for the constant supply, which the corporation opposed; and it was ultimately withdrawn. The town council made two orders for the payment out of the borough fund of the expenses of the opposition before the justices and in parliament respectively, which were paid, notwithstanding objection that the orders were ultra vires. There was no surplus from property of the corporation, and borough rates were made. On a rule for a certiorari, under 7 Wm. 4 & 1 Vict. c. 78, s. 44, to bring up these orders for the purpose of quashing them:—

Held, that, assuming the objects for which the expenses were incurred to be for the public benefit of the inhabitants of the borough, yet they were not within the terms of s. 92 of the Municipal Corporation Act (5 & 6 Wm. 4, c. 76), as "expenses necessarily incurred in carrying into effect the provisions of the Act;" and they could not come within the clause which enabled the town council to apply the funds "for the public benefit of the inhabitants of the borough," as there was no surplus.

13 Geo. 2, c. 18, s. 5, only applies to orders, &c., of justices; and there is no general rule of practice which requires application for a certiorari to be made within six months of the making of the order, &c., sought to be quashed.

Attorney General v. *Mayor of Wigan* (Kay, 268; 5 De G. M. & G. 52; 23 L. J. (Ch.) 429), commented upon.

Rule, calling on the Council of the borough of Sheffield to shew cause why a writ of certiorari should not issue to bring up, for the purpose of quashing them, two orders of the Council ordering the payment out of the borough fund of 1000*l.* and 1526*l.* respectively.

In the town of Sheffield there is a waterworks company, incorporated by Act of Parliament, which supplies the greater part of the municipal borough with water. By one of their Acts (27 & 28

Vict. c. cccxxiv. s. 106) the company were bound, after five years from the passing of the Act, on the requisition of the town council, to have the water constantly laid on; and by a previous Act (23 & 24 Vict. c. lxx. ss. 6, 7) the company were empowered, on a constant supply being laid on, to make regulations which the consumers were bound to observe, subject to the regulations being allowed by two justices, any person aggrieved having the right to appear before the justices in opposition to the regulations proposed.

On the 30th of July, 1869, the town council required the company to provide a constant supply; regulations were drawn up by the company, and the town clerk gave notice of opposition on behalf of the corporation, the ground of opposition being that the regulations imposed unnecessarily onerous conditions on the consumers. The regulations came before the justices on the 4th of November, 1869, and the discussion was carried on before them till the 16th of November, when the justices took time for consideration.

On the 20th of November the company gave notice of their intention to apply to parliament for an Act; by the proposed bill the constant supply was to be deferred till after 1875; and there were other clauses as to regulations, &c., more favourable to the company than their previous Act. The corporation appeared and opposed this bill before parliament.

On the 19th of February, 1870, the justices gave their decision, by which the proposed regulations were greatly modified in favour of the consumers.

The bill was withdrawn by the company on the 16th of March, 1870.

The corporation had also promoted a waterworks bill of their own; but this was withdrawn on an injunction being obtained in the Court of Chancery against the application of the corporate funds to the promotion of the bill.

There is no surplus fund from the property of the corporation, and a borough rate is made every year to defray the expenses.

On the 9th of March, 1870, an order was made by the town council on the treasurer of the borough for the payment to the town clerk, out of the borough fund, of 1000*l.* on account of the expenses incurred in opposing the bill in parliament. This order

1871

THE QUEEN v. MAYOR OF SHEFFIELD.

was paid on the 20th of April. On the 8th of June a similar order was made for the payment of 1526*l.* on account of the expenses of opposing the regulations before the justices. This order was paid on the 8th of July. Previous, however, to the payments, all parties were aware that the orders were objected to as ultra vires; and a correspondence on the subject ensued between the town clerk, on behalf of the corporation, and the solicitors to the present applicants, which commenced on the 8th of June, 1870.

The rule was obtained on the 30th of January, 1871, under 7 Wm. 4 & 1 Vict. c. 78, s. 44 (1), on behalf of one Roberts and others, who were ratepayers of the borough and also directors of the waterworks company.

Manisty, Q.C., H. Lloyd, Q.C., Shield, and *J. E. Barker,* shewed cause. There is a preliminary objection that the rule ought to have been moved within six months of the making of the orders. The last order was made on the 8th of June, 1870, and the rule was not obtained till the 30th of January, 1871.

[LUSH, J. This is a rule under 7 Wm. 4 & 1 Vict. c. 78, s. 44; the statute of 13 Geo. 2, c. 18, s. 5, which requires the certiorari to be moved for within six months, only applies to convictions and other proceedings before justices of the peace.]

The same practice is adopted as to other proceedings.

[COCKBURN, C.J. There is no such fixed rule of practice; we must judge of the reasonableness of the application looking at all the circumstances of each particular case; and we think that in the present case the rule ought to be argued on the merits.]

The objection to these orders is, that they are for a misapplication of the borough fund, inasmuch as the objects for which the expenses were incurred are not within the terms of s. 92 of 5 & 6

(1) 7 Wm. 4 & 1 Vict. c. 78, s. 44: "Whereas it is expedient to give all persons interested in the borough fund of every borough a more direct and easy remedy for any misapplication of such fund, be it therefore enacted that any order of the council of any borough for the payment of any sum of money from or out of the borough fund of any borough may be removed into the Court of King's Bench by writ of certiorari, to be moved for according to the usual practice of the said Court with respect to writs of certiorari; and that such order may be disallowed or confirmed upon motion and hearing, with costs, according to the judgment and discretion of the said Court.

Wm. 4, c. 76. (1) It is difficult to conceive anything more for the benefit of the borough at large than a constant supply of water, and the opposition to the regulations before the justices, and to the bill in parliament, was for the purpose of securing to the inhabitants this constant supply without the infliction of too onerous conditions.

[LUSH, J. There is no surplus here; and the part of s. 92 which refers to the surplus, shews that mere public benefit was not contemplated in the other part. In order to justify the expense, it

(1) 5 & 6 Will. 4, c. 76, s. 92: "After the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the said schedules (A.) and (B.), or to any member or officer thereof, in his corporate capacity, and every fine or penalty for any offence against this Act (the application of which has not been already provided for) shall be paid to the treasurer of such borough; and all moneys which he shall so receive shall be carried by him to the account of a fund, to be called 'The Borough Fund;' and such fund" (subject to the payment of debts, &c.), "shall be applied towards the payment of the salary of the mayor, and of the recorder, and of the police magistrate, hereinafter mentioned, when there is a recorder or police magistrate, and of the respective salaries of the town clerk and treasurer, and of every other officer whom the council shall appoint, and also toward the payment of the expenses incurred from time to time, in preparing and printing burgess lists, ward lists, and notices, and in other matters attending such elections as are herein mentioned, and, in boroughs which shall have a separate court of sessions of the peace, as is hereinafter provided, towards the expenses of the prosecution, maintenance, and punishment of offenders, and towards such other sum to be paid by such borough to the treasurer of such county as is hereinafter provided, and towards the expense of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act; and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants and improvement of the borough: . . ." "And in case the borough fund shall not be sufficient for the purposes aforesaid, the council of the borough is hereby authorized and required from time to time to estimate, as correctly as may be, what amount, in addition to such fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this Act; and in order to raise the amount so estimated the said council is hereby authorized and required from time to time to order a borough rate, in the nature of a county rate, to be made within the borough," &c.

1871

THE QUEEN v. MAYOR OF SHEFFIELD.

must be for the purposes of carrying into effect the provisions of the Act.]

In the case of *Attorney General* v. *Mayor of Wigan* (1) there was no surplus, and the present Lord Chancellor, then Vice-Chancellor, held that the expenses incurred in the prevention of the withdrawal of water from a watercourse was within the Act; and this judgment was upheld by the Lords Justices. (2)

[MELLOR, J., referred to *Reg.* v. *Mayor of Warwick* (3) as being contrary to this contention.]

Lord Cottenham, C., in *Attorney General* v. *Mayor of Norwich* (4), said that the purposes of the Act included all expenses of any duties imposed on the corporation by the Act. But assuming these expenses not to be strictly within the Act, the rates have been made and the expenses paid out of them, and the ratepayers for the future will not be damnified; under these circumstances the Court will not interfere; the Court have clearly a discretion, under 7 Wm. 4 & 1 Vict. c. 78, s. 44; and they will not interfere when payment has been made: *Reg.* v. *Prest* (5); *Reg. v. Newborough.* (6)

Pollock, Q.C. (*Quain, Q.C.*, and *Kemplay*, with him), in support of the rule. As there is no surplus, the question turns entirely on the phrase, "all other expenses which shall be necessarily incurred in carrying into effect the provisions of this Act;" and it is clear that the objects for which these expenses were incurred are not within those words, even conceding that they were for the public benefit of the borough, which may be well disputed, as the water company do not supply the whole of the borough. *Attorney General* v. *Mayor of Wigan* (2) is no authority against the present application; for, taking it at the furthest, the prevention of a nuisance is a very different thing from the present objects. The case of *Reg.* v. *Thompson* (7) shews with what jealousy this Court watches the expenditure of the borough fund.

[He was then stopped by the Court.]

COCKBURN, C.J. I am of opinion that this rule must be made

(1) Kay, 268; 23 L. J. (Ch.) 429.
(2) 5 De G. M. & G. 52; 23 L. J. (Ch.) 429.
(3) 8 Q. B. 926; 15 L. J. (Q.B.) 306.
(4) 2 My. & Cr. 406, 425.
(5) 16 Q. B. 32; 20 L. J. (Q.B.) 17.
(6) Law Rep. 4 Q. B. 585.
(7) 5 Q. B. 477.

1871

THE QUEEN v. MAYOR OF SHEFFIELD.

absolute. The question turns upon the effect of s. 92 of the Municipal Corporation Act (5 & 6 Wm. 4, c. 76). It appears that the expenditure in the present instance, to cover which the orders have been made on the borough fund, was of a two-fold character, partly for opposing in parliament a bill by the waterworks company to obtain fresh powers, and partly in respect of expenses incurred in opposing certain rules and regulations to which the water company (who, in point of fact, are the parties now applying to this Court) sought to obtain the approval of two magistrates, in order to regulate the constant supply of water which they were bound to afford to the town.

With regard to the expenses incurred in opposing the bill in parliament, I think it is abundantly clear, and open to no doubt or question, that that was a purpose to which, looking at the words of the section, it was altogether beyond the scope of the municipal government, or anything to be done under that Act of Parliament, in a borough without a surplus fund, to apply the borough funds.

The section, after specifying certain expenses to which the borough fund is to be applied, the last of which is the prosecution, maintenance, and punishment of offenders, proceeds, "and towards the expense of maintaining the borough gaol, the house of correction, and the corporate buildings, and towards the payment of constables, and of all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this Act." Up to that point the section is dealing with the borough fund independently of any surplus which the corporation may have from property belonging to them.

Now, the opposition in parliament to a bill introduced by a waterworks company, relating to the supply of water to the town, cannot possibly, as it seems to me, be a thing necessarily incurred in carrying the Act into execution.

Then we come to the expenses incurred in the opposition to these rules and regulations. It appears that the water company, by one of their Acts of Parliament, were under an obligation to furnish what is called a constant supply after a certain date, upon requisition by the corporation, instead of the supply which had up to that time been furnished. In order to carry into execution the works necessary for this constant supply, the company applied to have

1871

THE QUEEN v. MAYOR OF SHEFFIELD.

certain rules and regulations with reference to the constant supply, which they were entitled to make, approved, as was necessary, by two local magistrates; and the great question in this case is, how far the corporation, coming forward to oppose the rules and regulations as proposed by the company, are entitled to have the expenditure thereby occasioned defrayed out of the borough rate.

I must say, in the first place, it seems to me, looking to the rules and regulations and the objections taken on the part of the corporation, and to the result in the shape of actual disallowance of many of the proposed rules and regulations and the important modifications and qualifications introduced with reference to others, that it must be taken that the opposition of the corporation was meritorious and in the true interests of the borough. It appears that the mode in which the water company, upon these proposed rules and regulations, intended to give effect to their obligation to furnish a constant supply of water, would have been attended with a degree of expense to those who are to have the benefit of that constant supply which would, to a considerable extent at all events, frustrate the very purpose which the obligation to furnish the constant supply was to insure to the public. Therefore it must not be taken that, in deciding that this rule must be made absolute on the ground that this expenditure is not chargeable on the borough rate, we proceed at all on the supposition that there was anything to blame on the part of the corporation in their opposition to the rules and regulations in question. The whole question is whether the words of the Act can be so construed as to extend the applicability of the borough rate to such an expenditure as this. I have already referred to the earlier words of the section; and it is only in case of a surplus that such a matter as this could properly come within the powers of the corporation to apply the borough fund: "In case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants and improvement of the borough." In the present case there is no surplus, consequently the corporation cannot have the benefit afforded by that provision. I think, therefore, that, assuming for the present purpose that this expense was incurred for the benefit and improve-

ment of the borough, granting that it would have been, if there had been a surplus, within that part of the section, yet, there being no surplus, the corporation cannot have the benefit of it.

The only difficulty the Court has in interpreting the Act arises, I think, from what was said by the present Lord Chancellor in the case of *Attorney General* v. *Wigan* (1), where, the question being as to the application of the borough fund to a matter that might at first appear to be hardly within the scope of s. 92, it was at all events held by the present Lord Chancellor, then Wood, V.C., not to be a matter for injunction to prevent such an application of the borough fund. But on looking at the judgment, it appears that the ground on which the Vice-Chancellor refused to grant the injunction was that, inasmuch as the expenditure had been incurred for the prevention of what would have led to the creation of a nuisance, and as the corporation had within its powers of local government the duty of preventing nuisances, that might be said to be within the scope of its powers, and, therefore a thing done in furtherance of the government of the borough and the execution of the powers of the Act.

Without further observing upon that case, it is enough, I think, to say, that it proceeded on a technical ground, namely, that the matter was one in the character of a nuisance; and as that does not arise in this case, there is nothing in the Municipal Corporation Act which makes it incumbent on the local government or the town council to interfere in the matter of the supply of water, therefore it cannot be said that this opposition was anything done within the scope of the local government or in the execution of the powers of the Act.

I very much regret the conclusion at which I am forced to arrive, as I believe that the corporation were actuated by the laudable desire to protect the true interests of the borough, and to prevent the water company from frustrating a very important sanitary provision, namely, that they shall afford a constant supply. I very much wish I could protect the corporation against the expenses which must now fall upon the individual members; but we cannot strain the words of the statute so as to include these expenses

(1) Kay, 268; 23 L. J. (Ch.) 429.

1871

THE QUEEN v. MAYOR OF SHEFFIELD.

within the terms "carrying into effect the provisions of the Act." Therefore the rule must be made absolute.

BLACKBURN, J. I am of the same opinion. What we are asked to do is to act under 7 Wm. 4 & 1 Vict. c. 78, s. 44. [The learned judge read the section]. One point which we must consider is this: In this particular case the orders have been made and have been acted upon, the treasurer has obeyed them, and the cheques have been paid; and one objection taken was that we should not, according to the usual practice of the Court of Queen's Bench, quash the orders after they have been acted upon. But it appears distinctly as to these orders, that one of them was acted upon immediately after, if not before, it was drawn up, the other was acted upon with perfect knowledge that it was objected to; and I think we should be baffling the intention of the legislature if we were to say that an order, made by the town council, and acted upon hastily, is not to be reviewed afterwards, and that they can themselves, by paying the money, oust the Court of its jurisdiction to inquire whether the order was right or wrong, and oust the parties of the power of applying to us. This seems to be clear upon the authority of the case of *Reg.* v. *Thompson* (1), if we wanted authority. Lord Denman says that though an order had been acted upon, the Court must quash it, as it was without authority; and what was the consequence of that, and who would suffer from its being acted upon, was a matter as to which the Court was not bound to look; and therefore the order was quashed. I say here the same. The question of who must pay the money, and what will be the consequences, we have nothing to do with; but those who did hastily act upon the order, which they were aware was questioned, must take the consequences. I only wish, however, to guard against being thought to be saying, that, if an order has been bonâ fide acted upon, and if the parties have altered their position without the least knowledge of its being disputed, in such a case as that it might not be a proper thing to consider whether, in our discretion, we should grant a certiorari to quash the order, if it was so brought before us.

But in the present case the real question comes to be, were these orders made for a lawful purpose? And the question is,

(1) 5 Q. B. 477.

1871

THE QUEEN v. MAYOR OF SHEFFIELD.

whether or not the corporation or the town council had the power to do these things, and charge the borough rate for them: for the corporation had not an estate or funds of their own. Its funds are produced by the borough rate, and the question is not, whether the town council might lawfully have done the things which are spoken of, but whether they could do them, and incur the expense upon the credit of the borough, charging the borough rate for them. Those are two separate questions: first, whether they might lawfully and properly do what they did; secondly, whether they might charge the borough fund for the purpose. The terms of the Municipal Corporation Act are what we must look to, and it must be remembered why that Act was passed. Before that Act, municipal corporations were owners of estates, and they might spend the estates subject to very little control; and, in point of fact, there was great jobbery and great waste of the estates; and one very great object of the Municipal Corporation Act was to restrain the town council. Accordingly, in s. 92, it is specially enacted that all the property shall be brought into the borough fund; and then it provides that the borough fund shall first be applied to the payment of debts, then to the expenses of the police which are mentioned, then towards prosecutions, then to the expenses of maintaining the borough gaol, and then towards the payment of constables, and "of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act; and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under direction of the council, for the public benefit of the inhabitants and improvement of the borough." And if the funds are insufficient for the above purposes there must be a borough rate in the nature of a county rate to supply the deficiency.

In the present case there is no surplus, but there is a borough rate to supply the deficiency; and the question is, on the construction of this section, can the purposes for which these two orders have been made be said to be expenses not therein otherwise provided for, which have been necessarily incurred in carrying into effect the provisions of the Act? It is first necessary to see what those

1871

THE QUEEN v. MAYOR OF SHEFFIELD.

purposes were. This much is clear, that there is a water company in Sheffield, which supplies, not the whole, but a large portion of the town of Sheffield with water. That water company have under various Acts of Parliaments come into this position: They are obliged, on the requisition of the town council, within a certain time, to give a constant supply, and they have also obtained a power in one of their Acts by which they are entitled to make reasonable rules and regulations.

By s. 6 of the Act of 1860, "The company from time to time may make reasonable regulations for the purpose of preventing the waste or misuser of water supplied by them, including regulations prescribing the nature, strength, size, and position of the pipes, cocks, and other apparatus which might tend to such waste or misuser." That is a power very commonly given to water companies, and obviously it is a reasonable power. But in this water company's Act there is a further stipulation in s. 7: that these regulations are not to come into force until approved of by two borough justices.

It appears that the water company wished to pass certain regulations within s. 6, and they applied to two justices for the purpose of having these regulations approved; and then the town council of the borough opposed those regulations on certain grounds; and whether or not, that opposition was so conducted as to be extravagant, and to be a great waste of money, I say nothing; but putting it merely on this, that the town council thought that the regulations were such as would be oppressive to some of the inhabitants, I feel it is quite impossible to say that the corporation were making, in the legal sense of the word, an "impertinent" intrusion, or that they were doing a thing which the town council had nothing whatever to do with. While the town council were opposing these regulations, the water company, apparently being afraid that the justices might refuse the regulations altogether, promoted a bill in parliament, in which they proposed to have powers to make regulations, and also to do some small matters which would have the effect, no doubt, of materially altering the provisions of their Act, by which they would affect a large portion of the borough. Again, I think the town council cannot be considered as impertinent interlopers, or as intermeddling in matters with which they had no concern,

1871

THE QUEEN v. MAYOR OF SHEFFIELD.

when they opposed that bill, and the House of Commons might well think they had a locus standi; but the question is, can they oppose it, and incur the expense of doing so upon the credit of the borough rate? They were further proposing to promote a bill of their own, and proceedings were taken in Chancery, and an injunction obtained in Chancery to prevent their applying the funds of the borough in promoting a bill of their own. Accordingly, they have never throughout attempted to charge any portion of that upon the borough fund, and we have no concern with it on the present occasion, except as an authority of the Court of Chancery deciding that it would be a misapplication of the funds to apply them for the purpose of promoting a bill, although it was a bill that, as a matter of fact, affected the interests of the inhabitants. Now, can we say as to these two matters, which do concern the interests of the inhabitants, and as to which the town council cannot be considered as impertinent intruders, can we say that these are matters which come within the terms of s. 92 of the Act, as being expenses necessarily incurred in carrying into effect the provisions of the Municipal Corporation Act? There are some things which are obviously so, though they are not here enumerated. We have already decided more than once that where there is property belonging to the corporation—estates of their own—and anybody attempts to take away those estates, although there is no express enactment, yet the very fact, that the corporation are owners of the property which is put into the borough fund, would make any litigation concerning it a purpose for carrying out the objects of the Act within the general terms. Whether or not we have any power in the Court of Queen's Bench, if litigation is commenced and expenses are incurred for such a proper purpose, to inquire whether that litigation was excessive, or those expenses were excessive, is a point on which I have not made up my mind. But that the Court of Chancery has power to look into it and say whether it is reasonable or not, seems to be well established. But there is no pretence for saying that what the council were doing here was, in the least degree, intended to protect their property. We must take it that the expense was really incurred, and that the town council were coming forward, and were justified morally in coming forward, on the

1871

THE QUEEN v. MAYOR OF SHEFFIELD.

ground that they were protecting the interests of a large portion of the inhabitants. Then, can it be said to be within the purposes of the Municipal Corporation Act? I have looked through the Act, and endeavoured to discover some words which would enable us so to decide; but I have not been able to find any.

There were several cases cited from the courts of equity, *Attorney General* v. *Mayor of Wigan* (1), and one or two others, where there was a surplus; and probably under the later words of the section they might employ such surplus for the public benefit of the inhabitants. Such a question it is not necessary now to decide, but I should say it is at least a very arguable question; but those cases where there was a surplus, such as *Attorney General* v. *Mayor of Norwich* (2), evidently do not apply to the borough rate. The only authority which bears in favour of saying the corporation could pledge the borough rate for such a purpose is the opinion of the present Lord Chancellor, then Vice-Chancellor Page Wood, in the case of *Attorney General* v. *Mayor of Wigan.* (1) The corporation of Wigan had expended, or rather had become liable for very considerable sums, for the purpose of opposing a bill by which the corporation of Liverpool would have been entitled to take away the water of the river Douglas, which flowed through Wigan, and was in the nature of a common sewer. All that was done by the present Lord Chancellor, which was approved by the Lords Justices afterwards, was to say "that this is not so clear a case that we will grant an injunction," and, consequently, what was done there is not in any way an authority binding upon us, because the point yet remains to be decided, and I cannot think that what the Lords Justices upon appeal say can be said to intimate an opinion much one way or the other. What the Vice-Chancellor put it upon was this: He said the municipal corporations have, by s. 90, power, amongst other things, to make by-laws for the stopping of nuisances, and to fine people 5*l.* under those by-laws; and then, upon what I cannot but look upon as rather a strained construction of the Act, he considered that it was part of the purposes of the Act that the corporation should stop nuisances altogether. And inasmuch as the taking away of water from the river Douglas, and reducing that which was

(1) Kay, 268; 23 L. J. (Ch.) 429. (2) 2 My. & Cr. 406.

a common sewer with a flush of water to a common sewer not flushed with plenty of water, would probably produce a nuisance, therefore the opposition to the bill was carrying out the purposes of the Act. That seems to me rather a strained construction of the Act; but I cannot shut my eyes to this, that the adoption of that reasoning shews that the Vice-Chancellor very much wished to say that the spending money for such a purpose as this might be lawful; and therefore I cannot much doubt if he were sitting on the bench with us now, although the argument might have induced him to change his opinion, he would have started with a desire to support these orders, and I must look upon that case as an authority to that extent. I have looked at it to see whether it could be reconciled with the words of the Act, but I think it cannot; and I think the Vice-Chancellor might probably have changed his opinion if he had had his attention called more particularly to the words of the Act.

Therefore, although this might be a very legitimate purpose for which the town council should interfere and lend their name and the prestige of their authority, and spend any money they might have, or any money which might be subscribed for the purpose, yet I cannot come to the conclusion that they were justified in pledging the borough rate for the purpose; and taking that view, I think both these orders ought to be brought up and quashed.

MELLOR, J. I have come to the same conclusion. It appears to me, when the facts are understood, that the question lies in a very narrow compass; and it is, whether or not the opposition to the promotion of a bill in parliament, and the opposition to these regulations, are matters which can be charged to the borough rate. The words of the section upon which this matter turns contemplate two different states of things: one in which a borough rate must necessarily be made in order to pay the expenses, and the other in which the surplus may be applied. And I have come to the conclusion that the first part of the clause is limited to expenses kindred to those which are specifically named; and for fear some such kindred expenses should be omitted, the legislature added the words, "and all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this Act."

1871

THE QUEEN v. MAYOR OF SHEFFIELD.

I quite agree that where there is a surplus, as there is in some boroughs, and it is necessary to make an appropriation of that surplus, then it is to be appropriated under the direction of the council for the public benefit of the inhabitants and the improvement of the borough. What may be intended in those terms it is not now necessary to consider; but certainly, primâ facie, it does not seem to me, as at present advised, that even under that part of the section, these expenses could very well have been paid. But there is no surplus, and therefore we are confined to the previous words of the section; and confining myself to those words, it appears to me that we are not warranted in saying that these expenses are chargeable to the borough rate. I am far from saying that the interference of the council in these matters was an officious interference. On the contrary, in all probability, in regard to some opposition at all events, I think it may be taken to have been properly made, that is, morally properly.

LUSH, J. I am of the same opinion. I share in the regret which has been expressed by the Lord Chief Justice, at being constrained to come to the conclusion that these two orders cannot be maintained, but must be set aside. If the corporation had been possessed of a surplus sufficient to bear the outlay, a surplus arising from any property which they might have, or from any fines or penalties which had been paid, or from other source of income of that description, apart from the borough rate, I should have thought that this was a very proper application of it, as being for the public benefit of the inhabitants and the improvement of the borough. I cannot help thinking that the corporation acted with perfect bona fides in the opposition to the bill, and in the proposal to bring in a bill of their own to meet that, and also in opposing the rules and regulations proposed by the water company, in the genuine belief that they were acting for the benefit of the inhabitants; and, as I understand, the result shews that they were so acting. Therefore, if they had any funds applicable to such a purpose, I should have thought this was a very proper application of them.

But I have no doubt at all, in a case like this, where the corporation had no property and no surplus, where they had to make a borough rate in order to levy the funds necessary to carry into effect the provisions of the Municipal Corporations Act, that they

could not charge these expenses to the corporation fund. The items of expense which they are justified in incurring have been already sufficiently referred to, and I need not, therefore, go through the list of them in the 92nd section. The enumeration closes with the expression, "All other expenses, not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of the Act." That means, besides the expenses of performing the duties specifically enjoined upon them by that and the other sections, whatever expenses may be incident to the general purposes of the Act, namely, maintaining the good rule and government of the borough, are what they are justified in incurring out of the borough rate; and the good rule and government of the borough is put as something different from that which may be for the public benefit of the inhabitants and the improvement of the borough, as to which the surplus only, if there is one, is to be applied.

With reference to the case which has been quoted of *Attorney General* v. *Mayor of Wigan* (1), it appears to me that there is a material distinction between that case and this. The 90th section gave powers to the corporation to make by-laws not only for the good rule and government of the borough, but for the prevention and suppression of all such nuisances as are not already punishable in a summary way by virtue of any Act in force throughout the borough; and it is upon that clause that the present Lord Chancellor based his judgment. His words are these: referring to that part of the 90th section, "It plainly, in directing them to make by-laws of that description, recognizes in them a duty incumbent on them, not merely of that restricted character which has been suggested, but a plain duty of taking care that there shall be no nuisance in the town. For what can be the reason of giving them this power of making these by-laws, unless that was a part of the duty incumbent upon the corporation? Now, it seems to me very strange to say, if it be a corporate duty to prevent nuisances, and to prevent them by by-laws, yet if an enormous and gigantic nuisance were about to be perpetuated, and the corporation were to take steps by applying to this Court through the medium of the Attorney General for an injunction to restrain such nuisances, that they would not be allowed the costs

(1) Kay, 268; 23 L. J. (Ch.) 429.

1871

THE QUEEN v. MAYOR OF SHEFFIELD.

of such a proceeding. It seems to me that it would be scarcely possible to hold that if the corporation of Liverpool were about to do the very thing which they have done with the sanction of the legislature without that sanction, if they were about to abstract these 800,000 gallons of water a day from the town, or if there had been a perfectly pure stream used for the purpose of drinking instead of being used for the purpose of sewage, and they had brought down an enormous mass of foul water which rendered the river perfectly inapplicable for the use of the inhabitants, it seems to me it would be a very strange thing to say in the case of a continued nuisance of that description, although the corporation are at least under a moral obligation to protect the town from all petty nuisances, yet they shall not lay out a farthing to prevent a large nuisance like that to all the inhabitants of the borough. It seems to me that a case of that kind would be within the words 'all other expenses necessarily incurred for carrying into effect the provisions of the Act,' which, as Lord Cottenham says in *Attorney General* v. *Mayor of Norwich* (1), 'does not mean mere expenses of meetings, but expenses of duties imposed on them.'" (2)

Therefore, whether the Vice-Chancellor was right or wrong in putting what he calls "a gigantic nuisance" within s. 90, the ratio decidendi clearly is, that, as the duty of preventing nuisances was imposed upon the corporation specifically, they were therefore justified, by what may be called the equity of that clause, in incurring the expense which was the subject of that suit. That, however, is very different from this case, because there is nothing in s. 92, having any reference to the purposes of the borough rate, which can in any way justify the outlay; though, as I have said, if they had had a surplus fund, I should think that it might very properly have been applied to a purpose which was for the benefit of the inhabitants and the improvement of the borough.

Rule absolute.

Attorneys for prosecutors: *Pitman & Lane, for R. B. Smith, Sheffield.*

Attorneys for defendants: *R. & W. B. Smith, for J. Yeomans, Sheffield.*

(1) 2 My. & Cr. at p. 425. (2) Kay, at pp. 277, 278.

THE EAST LONDON WATERWORKS COMPANY, APPELLANTS; THE LEYTON SEWER AUTHORITY, RESPONDENTS.

1871
May 27.

Rate—Assessment of Canal "Land covered with Water"—Land occupied by Filter Beds—Land used for purpose of preparing Sand for Filter Beds—Land occupied by Pipes—Sewage Utilization Act, 1867 (30 & 31 *Vict. c.* 113), s. 17.

By 30 & 31 Vict. c. 113, s. 17, the occupier of any land covered with water . . . shall pay to the sewer rate in respect of his property one fourth part only of the rate in the pound payable in respect of houses and other property.

A waterworks company were possessed of a canal, of filter beds supported on brick arches, and sometimes covered with water, at other times not, of land used for keeping sand for the filter beds; and they also occupied land by iron pipes, mains, and service pipes:—

Held, that the canal and the filter beds were land covered with water within the meaning of s. 17, and ought to be assessed at one fourth of the amount to be imposed on houses; but that the land used for the purpose of keeping sand, and the land occupied by iron pipes, mains, and service pipes, did not come within that description, and ought to be assessed at the full value.

CASE stated under 12 & 13 Vict. c. 45, on an appeal to the Essex Quarter Sessions.

The respondents are the Leyton Sewer Authority, constituted by virtue of the Sewage Utilization Act, 1865 (28 & 29 Vict. c. 75); the Sanitary Act, 1866 (29 & 30 Vict. c. 90); and the Sewage Utilization Act, 1867 (30 & 31 Vict. c. 113).

On the 23rd of April, 1869, the respondents, under s. 17 of the Sewage Utilization Act, 1867 (1), made a rate for the purpose

(1) 30 & 31 Vict. c. 113, s. 17: "Where the sewer authority of a district is a vestry, select vestry, or other body of persons acting by virtue of any Act of Parliament, prescription, custom, or otherwise, as or instead of a vestry or select vestry, such authority shall for the purpose of defraying any expenses incurred in carrying into effect the Sewage Utilization Act, 1865, or this Act, issue their precept to the overseers of the parish of which they are the authority, requiring such overseers to pay over the amount specified in such precept to the sewer authority. . . . The overseers shall comply with the requisitions of such precept by levying a separate rate in the same manner as if it were a rate for the relief of the poor, with this exception [amongst others], that the . . . occupier of any land covered with water . . . shall, where a special assessment is made for the purpose of such rate, be assessed in respect of such property in the proportion of one fourth part only of the rateable value thereof: or where no special assessment is made, shall pay in respect of the said property one fourth part only of the rate in the pound payable in respect of houses and other property.

1871

EAST LONDON WATERWORKS COMPANY v. LEYTON SEWER AUTHORITY.

of carrying out the provisions of the Sanitary Acts, 1866 and 1868.

The appellants were assessed under the rate at the full amount in the pound in respect, amongst others, of the following property:—

No. 1552. Land occupied by the canal, with the appurtenances, used for the purpose of carrying water to the reservoirs, and other apparatus whereby the same is filtered for sale. No. 1553. Land occupied by the filter beds, with the supply and service pipes, service valves, locks, and other appurtenances thereto, fixed and used for the purpose of filtering water. No. 1554. Land adjoining same, used for the purpose of preparing sand in filter beds. No. 1555. Land, part of public roads, footpaths, and other ways occupied by iron pipes, mains, and sewer pipes.

The appellants contend that, in respect of the above four items, they should be rated as for land covered with water, namely, in the proportion of one fourth part only of the rate in the pound payable in respect of houses and other property, as mentioned in s. 17 of 30 & 31 Vict. c. 113.

No. 1552 consists of land occupied by the canal with banks, and is used by the appellants for the purpose of conveying water to the reservoirs, or other apparatus of the company for filtering the same, and cannot be used or made available for any other purpose.

No. 1553 consists of land occupied by a series of filter beds or reservoirs, with the supply and service pipes, service valves, locks, and other apparatus thereto fixed, and used solely for the purpose of filtering water. No part of item 1553 can be used or made available for any other purpose. The filter beds are divided into sections, and are kept alternately filled with water, each section being from time to time emptied for the purpose of cleansing the filtering medium. The covering over the beds is of sand or gravel (as a non-conducting material), supported by arches beneath. The ground surface over the beds is not available for any purpose other than that of a cover to the beds beneath. The beds in question practically form storage ponds, and are the only means of storage the appellants possess in the parish of Leyton.

No. 1554 consists of land adjoining to the last item, and forming the banks of the filter beds, some portion thereof can be and is used for the purpose of storing and preparing the sand necessarily

1871

EAST LONDON WATERWORKS COMPANY v. LEYTON SEWER AUTHORITY.

used as the filtering medium in the beds: but the same land cannot be used or made available for any other purpose.

No. 1555 consists of land, part of the public roads, footpaths, and other ways occupied by the iron pipes, mains, and service pipes of the appellants, and is not made use of, or available, or occupied by them for any other purpose.

The question for the opinion of the Court was, whether the property above mentioned, or any, and what part of it, is, within the meaning of s. 17 of the Sewage Utilization Act, 1867 (30 & 31 Vict. c. 113), liable to be assessed in the proportion of one fourth part only of the rate in the pound payable in respect of house and other property.

H. T. Atkinson, for the appellants. The appellants ought to be assessed at the lower rate. The object of the legislature in making a distinction between the rate to be imposed on houses and that to be imposed on other property is, that that class of property which derives the greater benefit from the sewerage works should contribute more than the class which derives less benefit: *Rep.* v. *Southwark and Vauxhall Water Co.* (1) The canal clearly comes within the words "land covered with water," and the banks are part of the canal. The reservoirs are ancillary to the canal. The fact of their having an artificial covering does not make them the less land covered with water. The land adjoining on which the sand is placed is in the same category. It is true that that land is not strictly land covered with water, but the reservoirs would be useless unless the filtering medium was occasionally renewed. With regard to the last item, *Rep.* v. *Southwark and Vauxhall Water Co.* (1) is an authority that pipes under the surface of the soil are to be rated at the lower rate.

[BLACKBURN, J. The words of the statute (18 & 19 Vict. c. 120, s. 105) in that case were different: that the owners and occupiers of houses, buildings, and property other than land, shall be rated three times higher than the owners and occupiers of land.]

H. Matthews, Q.C. (*Pearce* with him), for the respondents. It must be conceded that the canal which conveys the water to the reservoirs falls within the words of the statute, and is to be rated

(1) 6 E. & B. 1008.

1871

EAST LONDON WATERWORKS COMPANY v. LEYTON SEWER AUTHORITY.

at the lesser sum. But it is also clear that the land adjoining the reservoirs is not "land covered with water," and must therefore be assessed at the higher rate. With regard to the pipes and mains, they cannot be said to be land covered with water any more than a gas-pipe can be said to be a pipe covered with gas: *Reg.* v. *Birmingham Waterworks Co.* (1) It was also held in that case that reservoirs were land covered with water, and ought to be rated at the lesser rate. But the distinction between that and the present case is that here the reservoirs are not on the land; they are, in truth, buildings. They rest on brick arches, and are like cisterns on the top of a house. They do not, therefore, come within the words "land covered with water."

Atkinson was not heard in reply.

COCKBURN, C.J. I think that items 1552 and 1553 are within the meaning of the exception in s. 17. With regard to the filter beds or reservoirs, we decided the point in *Reg.* v. *Birmingham Waterworks Co.* (1) It is true, there is a distinction in the mode of construction between the reservoir in that case and the reservoir in the present case. The reservoir which is one of the subjects of the present appeal consists of a succession or series of filter beds, which are used alternately, sometimes being covered with water, and at other times not; but the only use of these filter beds is to contain water for the purpose of being filtered; and if some sections are left dry while others are covered with water, that is only a part of the filtering process. I think, therefore, this distinction is immaterial; and it is impossible to say that because during a time the filtering beds are not occupied by water they lose the character of a reservoir. They are intended to hold water, though they do not at all times hold water. I think they must be treated as a reservoir, and therefore that they come within the principle of the case referred to.

With regard to the land, adjoining the reservoir, and used for the purpose of keeping the sand which, after undergoing some process, is put into the filter beds for the purpose of purifying the water, I think that does not come within the language of the exception; and I think the same interpretation applies to No. 1555, the pipes

(1) 1 B. & S. 54.

1871

EAST LONDON WATERWORKS COMPANY v. LEYTON SEWER AUTHORITY.

and mains underneath the public roads. They cannot be said to be, in any sense of the term, land covered with water. We, of course, can only deal with the statutory provision. It may be that the whole of the works of this description, including everything accessory or necessary to the filtering process, as well as the canal and reservoir, if the attention of the legislature had been called to the matter, would have been brought within the exception. The legislature, however, has omitted to make any provision for waterworks under that term. It has merely used the words, "land covered with water," which, I think, apply to the canal and reservoir, and do not apply to the other matters.

BLACKBURN, J. I am of the same opinion. The exception in s. 17 of 30 & 31 Vict. c. 113, applies to a large class of things, and the legislature probably imagined that the things there enumerated embraced everything that did not come within the description of houses and other property similar to houses. But we have only to look at the things specified, and, amongst those things, waterworks are not found, and gasworks are not found, and doubtless there are other things that would not come within the description of the things which are enumerated. I think it very probable that the omission of waterworks was an oversight of the legislature. The only words at all applicable to this case are "land covered with water." I cannot think for a moment that the canal, which contains the water, and through which the water flows in coming to the reservoir, is not land covered with water. With regard to the reservoir, some doubt may be entertained; but I think the question is one of degree. Mr. Matthews said the surface of the ground, being covered with arches, the tops of which support the reservoir containing the water, is not land covered with water, but resembles a cistern at the top of a house. I think that the arches being built on the land may be considered part of the land. Whether the land was or was not covered with water, the use of it was to hold the water, and in effect it is permanently covered with water. The words of s. 17 do not, however, exempt the adjoining land, and consequently it will be rateable at the full value. Then, again, a pipe that is laid in the earth for the purpose of conveying water is, no doubt, an

1871

EAST LONDON WATERWORKS COMPANY v. LEYTON SEWER AUTHORITY.

occupation of the land, but the land it occupies cannot be said to be land covered with water. That will, therefore, also be rated at its full value.

MELLOR and LUSH, JJ., concurred.

Rate to be amended accordingly.

Attorney for appellants: *Denny.*
Attorney for respondents: *R. T. Wragg.*

June 24.

IONIDES AND CHAPEAUROUGE *v.* THE PACIFIC FIRE AND MARINE INSURANCE COMPANY.

*Marine Insurance—Policy to cover Goods upon Ship or Ships to be Declared—Misnomer—Innocent Misrepresentation, Effect of—Slip of Policy—*30 *Vict. c.* 23, *ss.* 7, 9.

The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description in the policy to which the assured elects to apply the policy; the object of the declaration of the vessel's name is to identify the particular adventure, and the assent of the underwriter is not required to the declaration, for he has no option to reject any vessel which the assured may select.

If a representation be made by the assured to an underwriter, however honestly and innocently, that a ship is new, when in fact she is old, a policy of insurance of goods on board of her made by him will be vitiated, for the age of the vessel must be material in considering the premium.

If the description in a policy of insurance designates the subject with sufficient certainty, or suggests the means of doing it, a mistake as to the name of the ship or as to other particulars, will not annul the contract, and a mistake in the name of the vessel, which does not prejudice the underwriter, does not defeat the policy.

30 Vict. c. 23, s. 7, enacts that no contract or agreement for sea insurance shall be valid unless expressed in a policy, and thereby renders an underwriter's slip incapable of being enforced either at law or in equity; but notwithstanding that statute, a slip may be given in evidence wherever it is, though not valid, material.

The plaintiffs, brokers in London, received from G., at Hamburg, instructions to effect a policy for 121*l.* upon hides on board the *Socrates*, Captain Jean Card. In the Veritas, issued by Lloyds, was registered the *Socrates*, Captain Albertson, a new Norwegian vessel, and next to it the *Socrate*, Captain Jean Card, an old French vessel. On the 24th of January, 1870, L., a clerk of the plaintiffs, went by their orders to the defendants' office, and asked D., their manager, to

1871

IONIDES v. PACIFIC INSURANCE CO.

grant a policy for 12*l.* on hides on board the *Socrates*. D. looked at the Veritas, and seeing the entry as to the *Socrates*, asked if that was the ship; L. replied that he though so: the policy for 12*l.* was thereupon granted by the defendants to the plaintiffs for the *Socrates*. The hides were really shipped on board the *Socrate*, and were totally lost.

The plaintiffs, by orders of K., at Hamburg, had opened with the defendants a policy on hides by ship or ships to be declared for 5000*l.*: the slip was signed, but the policy had not been prepared. On the 4th of February, 1870, one of the plaintiffs, at the defendants' office, wrote out a slip for a policy for 2455*l.* on hides per *Socrates*, and another slip for a policy for 2500*l.* on hides by another vessel; he stated to the defendants' clerk that, instead of drawing up an open policy for 5000*l.*, and then declaring on it for 4955*l.*, which would leave so small a balance as 45*l.*, it would be more convenient for all parties to have two ship policies; the clerk assented; and two policies were afterwards executed. The hides insured by the policy for 2455*l.* were shipped on board the *Socrate* and totally lost. The defendants had no reason to believe that the plaintiffs' principals, on the 24th of January and the 4th of February, were the same; and in fact they were not. At the trial the jury found that the parties, in entering into the contracts, both meant to insure the hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the *Socrates*, and that the defendants did not mean only to insure hides on board the *Socrates*:—

Held, as to the policy for 12*l.* that there was a mistake and a misrepresentation as to the vessel on board of which the hides were shipped, and that the defendants, being under no obligation to subscribe any policy for that 12*l.*, were not liable for goods on board the *Socrate*; but, as to the policy for 2455*l.*, that, the defendants being bound on the 4th of February to insure hides on board any ship selected by the plaintiffs, the misnomer was of no consequence, and the defendants were liable.

Affirmed 10 Q. B. 517

FIRST COUNT, that the defendants insured the plaintiffs as well in their own as that of the name or names of those to whomsoever the same might appertain, and, whether lost or not lost, in the sum of 3000*l.* on hides, as might be declared, part of 6000*l.* from any ports in the Brazils to any port of call and for discharge in the United Kingdom and or the continent of Europe between Havre and Hamburg, and continuing the risk from the United Kingdom or Havre by steamer to Hamburg, beginning, &c. "Afterwards interests on hides were declared to the defendants and accepted by them as interests to be recovered by the said policy, which interests were by the said declaration valued for the purposes of the said policy, and their aggregate said values amounted to 6000*l.*, and amongst them the following interest valued as aforesaid at 245*l.*, was declared, that is to say, 2600 drysalted hides, part of the value of which was declared to be covered by the said policy"

1871

IONIDES v. PACIFIC INSURANCE CO.

.... and it was by the said declaration declared that the said hides were insured by a certain vessel called, to wit, the *Socrates*, on one of the said voyages covered by the said policy as in the said declaration described, and the said declaration was indorsed on the said policy and assented to by the defendants. Averments of conditions precedent and of the loss of the hides, and an averment of interest in Messrs. Kalkman, and of the defendant's refusal to pay the sum of 245*l.*

Second count upon a policy of insurance for 2455*l.*, on hides valued at 2700*l.*, from Ceara to Hamburg, on board the good ship *Socrates* whereof was master , or whoever else should or might be master beginning the adventure, averment of the loss of the hides and of the interest being in Messrs. Kalkman, and of the defendants' omission to pay the sum insured.

Third count, that the defendants insured the plaintiffs, as well in their own as that of the name or names of those to whomsoever the same might appertain, and whether lost or not lost, in the sum of 2345*l.* on hides, "in conjunction with policies for 3500*l.*, dated the 14th of October, 1868, warranted to sail after the 1st of July, 1869, from any ports and places in the Brazils to a port or ports of call, and for discharge in the United Kingdom or on the continent of Europe, between Havre and Hamburg, both inclusive, on board the good ship $\frac{Y\ I}{viii}$ whereof was master , or whoever else should or might be master beginning the adventure," &c.; "afterwards interests on hides to the value and amount of 5250*l.* were declared to the defendants, and accepted by them as interests to be covered by the said last-recited policy in this count, and by the said policies for 3500*l.*, dated in October, 1868, and amongst them the following, that is to say, 1400 drysalted hides; and it was by the said declaration declared that the hides were insured by a certain vessel called, to wit, the *Socrates*, on one of the said voyages covered by the said last-mentioned policy, which voyage was in the said declaration described, and the said declaration was indorsed in the said policy and assented to by the defendants. Averments of conditions precedent and of the loss of the hides, of the interest being in Messrs. Gayen, and of the defendants' omission to pay the sum insured.

Fourth count on a policy of insurance "for the sum of 121*l.*

on 1400 hides, valued at 1450*l.*, being a re-insurance on part of policy issued by the Progress Insurance Co., subject to the same clauses and conditions as said insurance, and to pay as might be paid thereon from Ceara to Hamburg, on board the good ship *Socrates*, whereof was master , or whoever else might or should be master, beginning the adventure," &c., averments of conditions precedent, of the loss of the hides, of the interest being in Messrs. Gayen, and of the defendants' omission to pay the sum insured.

Pleas: 1. As to 1st and 3rd counts, payment into court of 134*l.* 9*s.* 8*d.*

2. As to 2nd and 4th counts, denial of contract.

3. As to 2nd and 4th counts, denial of interest.

4. As to 2nd and 4th counts, that the policies were not made for the benefit of Kalkman and Gayen respectively, as alleged.

5. As to 2nd and 4th counts, denial of shipment on board the *Socrates.*

6. As to 2nd and 4th counts, that the defendants were induced to subscribe the policies by the misrepresentation by the plaintiffs of a fact material to be known by the defendants, and material to the risks by the policies covered, that is to say, that the hides were shipped by the ship *Socrates,* whereas, in fact, they were shipped by another ship, that is to say, the *Socrate.*

7. As to 2nd and 4th counts, denial of loss of hides.

The plaintiffs took out of court the money paid in, and replied damages ultra, and joined issue on the pleas.

The defendants amended the pleadings by adding the following plea: As to the 2nd and 4th counts, that at the time of the defendants subscribing the policies, the plaintiffs wrongfully concealed from the defendants a fact material to the risk caused by the policies, viz., that the plaintiffs had received a letter from the consignees of the goods in the policies mentioned, and which ought to have been communicated to the defendants, whereby it appeared that the goods were shipped on board a foreign vessel, the name of whose master was Jean Card.

The plaintiffs joined issue on the additional plea.

At the trial at the sittings in London after Michaelmas Term, 1870, before Hannen, J., a verdict was found for the plaintiffs, with

1871

IONIDES v. PACIFIC INSURANCE CO.

leave to the defendants to move to enter a verdict for them, on the ground that no insurance was effected on goods on board the *Socrate*, and no loss was proved within the meaning of the several policies declared on; the defendants also moved for a new trial on the ground that the learned judge misdirected the jury, in putting to them as material, whether they thought the parties intended to insure the hides by whatever ship they might be carried, or that there was any evidence proper to be submitted to them that the parties insured or meant to insure hides carried by any other ship than the *Socrates*, and that they might properly find for the plaintiffs on the pleas of concealment and misrepresentation.

The facts of the case, the course of the trial, the arguments, and the cases cited, fully appear in the judgment of the Court.

May 30 and June 9. *Cohen* and *Lanyon* shewed cause. *Milward, Q.C.*, and *Murphy*, in support of the rule.

Cur. adv. vult.

June 24. The judgment of the Court (Cockburn, C.J., Blackburn, and Hannen, J.J.) was delivered by

BLACKBURN, J. This was an action on four different policies of marine insurance made by the defendants with the plaintiffs.

The plaintiffs are brokers, who, as is common, enter into policies in their own names, but on behalf of and to protect the interest of different constituents. No notice was given to the defendants for whom the different policies subscribed by them were made, but from the ordinary course of business they must have known that the plaintiffs probably had principals, and nothing was done by the plaintiffs to justify the defendants in concluding that the principals in the different policies were the same person. In fact, the policies which come in question in the present action were made for two different firms, Messrs. Kalkman and Messrs. Gayen, both of Hamburg.

In order to make the points raised at the trial and discussed in court intelligible, it is necessary to state what was the position of the plaintiffs with regard to both these firms in the latter part of January, 1870, when the transactions took place which give rise to the present dispute.

The plaintiffs, in pursuance of instructions received from Messrs. Gayen, had entered into policies in conjunction with each other to cover hides to a considerable value on ship or ships to be declared. The defendants had subscribed one of these policies for the amount of 2354*l.* Another of the policies was subscribed by another company, the Progress, which had failed, and was being wound up. So many interests had been declared on these policies that there remained so little open on them to declare that the proportion on the defendants' policy left open would be 725*l.*, and that on the policy in the Progress 121*l.*

In this state of things the plaintiffs received from Messrs. Gayen a letter dated the 23rd of January, written from Hamburg, directing them to declare on these policies to cover hides shipped on the *Socrates*, Captain Jean Card, from a port in the Brazils to Hamburg. The plaintiff Chapeaurouge having received this letter on the 24th of January, directed one of his clerks, Lambert, to go to the office of the defendants, and there declare on the *Socrates* for 725*l.*, so as to fill up the defendants' ship or ships policy, and at the same time to see if the defendants would at the same premium re-insure the portion of the risk covered by the policy in the insolvent company, the Progress, viz., 121*l.*

The letter of instructions was not by him, but the Veritas was lying on the table, and on looking into it the plaintiff and his clerk saw in the register, which is in alphabetical order, the *Socrates*, Captain C. J. Albertson, a new Norwegian vessel, and next to it the *Socrate*, Captain Jean Card, an old French vessel. Had the plaintiff recollected that the letter described the vessel as the *Socrates*, Captain Jean Card, he would probably have conjectured that the inaccuracy was in the name of the vessel, and that, as the fact turned out to be, the hides were shipped on board the *Socrate*; but not recollecting this, he observed to his clerk that a Norwegian ship of that character was very likely to be engaged in that trade, or words to that effect. The clerk went down to the office, and there saw the defendants' principal manager, Drummond. He then indorsed on the policy a declaration of interest by the *Socrates*, which he handed to Drummond to initial, and at the same time requested him to insure on the same ship 121*l.*, by way of re-insurance of what had been insured in the Progress Company.

1871

IONIDES v. PACIFIC INSURANCE CO.

Drummond, turning to the Veritas, and there seeing the *Socrates*, asked if that was the ship. Lambert replied that "he thought so;" and Drummond then initialed the declaration. At the same time a slip was prepared for a policy on hides, per *Socrates*, to cover 121*l.* at 66*s.* per cent., being the same premium. No discussion took place about the premium, probably because the transaction was so small, and was entered into rather to oblige a good customer than with any view of making a profit; but there can be no doubt that the premium on an old vessel such as the *Socrate* would have been higher than that on a new one such as the *Socrates*, though the difference on such a sum as 121*l.* would not have been more than a few shillings, and was probably neglected by both parties. The policy for 121*l.* was afterwards made out and executed. This finished the transactions so far as the plaintiffs were acting for Messrs. Gayen.

The 3rd count was on the declaration on the ship or ships policy to recover the 725*l.* The 4th count was on the policy for 121*l.*, and in both these counts the interest was averred to be in Messrs. Gayen, and the policies to be made on their behalf.

The plaintiffs had also opened with the defendants a policy on hides, by ship or ships to be declared, for 3000*l.* This had been done on behalf of Messrs. Kalkman. The plaintiffs had also received instructions from the same parties to open a further policy of the same nature to the extent of 5000*l.*, and had agreed with the defendants for it. The slip was signed, but the policy had not yet been prepared. On the 3rd of February there had been so many interests declared on the 3000*l.* policy that there remained open on it only 245*l.*

This being the state of things, the plaintiffs received a letter from Messrs. Kalkman, informing them that they had hides to the value of 2700*l.* coming by the *Socrates* from Brazil to Hamburg, and also hides to the value of 3600*l.* coming by the *Sophie*, and desiring them to insure 1100*l.*, and to declare on their open policies for the residue.

It will be observed that the interest open on the policy for 3000*l.*, viz., 245*l.*, the 5000*l.* for which the slip was signed, though the policy was not executed, and 1100*l.*, would, together, make 6345*l.*, being 45*l.* more than the amount coming by the two vessels, as

announced by the letter of the 3rd of February. The plaintiffs procured a policy for 1100*l.* on the hides per *Sophie*, and then, on the 4th of February, the plaintiff Chapeaurouge went in person to the defendants' office; he there saw a different clerk of the defendants, one Lark, and there was no controversy of testimony between them as to what took place. The plaintiff indorsed on the back of the 3000*l.* policy a declaration of interest on hides per *Socrates* to the extent still open on the policy, viz., 245*l.* He at the same time took the slip for the 5000*l.* policy on hides by ship and ships, and taking up two pieces of paper wrote out a slip for a policy for 2455*l.* on hides per *Socrates*, and another slip for a policy for 2500*l.* on hides per *Sophie*, and laid those four documents before Lark. Lark asked what this meant, and Chapeaurouge said that, instead of drawing up an open policy for 5000*l.*, and then declaring on it for 4955*l.*, which would leave so small a balance as 45*l.*, it would be more convenient for all parties to have two ship policies. Lark assented and initialed the declaration and the two slips.

The plaintiff Chapeaurouge went away, and soon after the two policies on hides by the *Socrates* and hides by the *Sophie* were duly executed on behalf of the defendants.

The 1st count was on the declaration of interest on the open policy of 3000*l.* to recover the 245*l.* The 2nd count was on the policy on the *Socrates* to recover the 2455*l.* In both these counts the interest was averred to be in Messrs. Kalkman, and the policies to be made on their behalf.

The defendants ultimately paid money into court on the 1st and 3rd counts, being those on the ship or ships policies, which the plaintiffs accepted, so that no question arose on the trial as to those two counts, though it has been necessary to mention them in order to render the defence as to the others intelligible.

As to the 2nd and 4th counts, they pleaded several pleas. Those that were material are, the 2nd, non-assumpsit; the 5th, that the hides were not shipped by the *Socrates;* the 6th, that the defendants were induced to subscribe the policy by a misrepresentation of a material fact, viz., that the hides were shipped by the *Socrates*, whereas they were shipped by the *Socrate;* the 7th, a denial of the loss, as alleged; and, lastly, an additional

1871

IONIDES v. PACIFIC INSURANCE CO.

plea, that the letter in which the name of the captain was given was not communicated.

On all these pleas issues were joined, which came on to be tried before my Brother Hannen and a special jury at the sittings at Guildhall. Evidence to the effect above stated was given. It was not disputed that hides to the value insured were, in fact, shipped on the *Socrate* on behalf of the parties interested, and that they had no hides whatever on board the *Socrates*, and that the *Socrate* was totally lost, with the hides on board. My Brother Hannen reserved leave to the defendants to enter a verdict for them on all or any of the issues, subject to the finding of the jury on the question which he left to them, which was, whether the parties, in entering into the contracts, both meant to insure the hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the *Socrates*, or whether the defendants meant to insure hides on board the *Socrates*. The jury answered this question in favour of the plaintiffs.

Mr. Milward obtained a rule nisi to enter the verdict according to the leave reserved. He also obtained it for a new trial, on the ground of misdirection; but that latter ground was merely pro majore cautelâ, in case the point was not properly raised.

We have come to the conclusion that the plaintiffs are entitled to retain their verdict on all the issues on the pleas to the 2nd count, that on the policy for 2455*l.*; but that the defendants are entitled to have a verdict entered for them on the 2nd and 6th pleas, so far as those pleas relate to the 4th count, namely, that on the policy for 121*l.*

Our reasons for this distinction are as follows: The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description, if any there be, in the policy, on the voyages specified in the policy, to which the assured elects to apply the policy. The object of the declaration is to earmark and identify the particular adventure to which the assured elects to apply the policy. The assent of the assurer is not required to this, for he has no option to reject any vessel which the assured may select; nor is it necessary that the declaration should do more than identify the

adventure, and so prevent the possible dishonesty of a party insured, who might intend to apply the policy to particular goods, so that they should be at the risk of the assurers, and he could come on them if there was a loss; and then, when those goods had arrived safely, to pretend that he intended to apply the policy to another set of goods still subject to risks: *Harman* v. *Kingston* (1); *Robinson* v. *Touray* (2).

It seems plain, therefore, that the declaration of the *Socrates* on the ship or ships policies was, under the circumstances, amply sufficient to shew that the assured had elected to attach those policies to the goods actually shipped on board the *Socrate;* and, consequently, that the defendants were well advised when they withdrew their defence to the 1st and 3rd counts. But on the 24th of January, when the policy for 121*l.* was agreed upon, the defendants were under no obligation to subscribe any policy for that 121*l.* They had an absolute right to decline to enter into a contract except on their own terms as to premium, or, indeed, into any contract at all unless they liked. And though we see no reason to doubt that the jury were quite right in finding that both parties were intending to insure the goods by the ship on which they were actually shipped, yet, when we find it not disputed that the one party expressly asked the question whether the ship was the Norwegian ship *Socrates*, and was told by the other party that he thought it was, we cannot think that there was any evidence on which the jury could properly find that the defendants entered into a contract to insure by any other ship than the *Socrates*. The most that could be legitimately found was that there was no contract, the parties not being ad idem. And we think also that, if the representation was made, however honestly and innocently, that the ship was a new ship, when, in fact, she was an old one, the policy was vitiated thereby, for the age of the vessel must be material in considering the premium. It was argued that a representation, if only as to an expectation or belief, is substantially complied with if the assured really had honestly entertained that expectation on sufficient grounds, and that the representation that "he thought" the ship was the Norwegian ship was literally true. We think this expression tantamount to an assertion that she was

(1) 3 Camp. 150. (2) 3 Camp. 158.

1871

IONIDES v. PACIFIC INSURANCE CO.

the Norwegian; but even were it otherwise, the letter of advice would, but for the carelessness of those who read it, have made them aware that the ship was that of which the captain was Jean Card, and therefore the plaintiffs had not reasonable grounds for believing that she was the Norwegian ship.

But, though we come to this conclusion as to the smaller policy of insurance for 121*l.*, we think the case is quite different as to the other policy for 2455*l.* Mr. Milward argued that there could be no difference, for the plaintiffs were the persons who made both contracts, and made them both with the defendants; and therefore, he argued, all that passed on the 24th of January between Lambert, representing the plaintiffs, and Drummond, representing the defendants, must be considered as present to the minds of the plaintiff Chapeaurouge in person, and Lark, representing the defendants, on the 4th of February, and as if then virtually repeated. But the transaction on the 24th of January was respecting one contract, in fact made for one principal, and the transaction on the 4th of February was respecting another contract, in fact made for another principal; and the defendants knew that they were almost certainly made for undisclosed principals, and had no reason to believe that the principals in the two contracts were the same. We think, therefore, that, even if the defendants had, in fact, on the 4th of February, recollected all that took place on the 24th of January, they would not have been justified in coming to the conclusion, without further inquiry, that the real parties were the same, and meant to make a similar contract. The identity of the name of the ship, and of the voyage described, would no doubt raise a reasonable suspicion that both parties meant to describe the same ship; but that was all. And, in fact, there can be no doubt that the plaintiff and Lark, if they ever knew what took place between Lambert and Drummond, did not, on the 4th of February, think of it. We think, therefore, that it is clear that the transaction of the 4th of February must be looked at as if that of the 24th of January had happened subsequently, or had never happened at all. And in looking at it in this way, the fact that a slip for a policy for £5000 on hides by ship or ships to be declared had been prepared and was in existence, is of great importance. The slip is, in practice, and according to the understanding of those engaged in marine insurance, the

complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, for which he would suffer severely in his credit and future business.

The legislature, for the purpose of protecting the revenue, had by the very strongest enactments provided that no such instrument should be given in evidence for any purpose: but all those enactments are repealed by the 30 Vict. c. 23, and the law is now governed by the 7th and 9th sections of that Act. By s. 7 no contract or agreement for sea insurance shall be valid unless expressed in a policy. And by s. 9 *no policy* shall be pleaded or given in evidence in any court unless duly stamped.

As the slip is clearly a contract for marine insurance, and is equally clearly not a policy, it is, by virtue of these enactments, not valid, that is, not enforceable at law or in equity; but it may be given in evidence wherever it is, though not valid, material; and in the present case it is material. The defendants could not, without a breach of faith, repudiate that engagement, and they never proposed to do so. And whilst they adhered to that engagement it was not material to them whether there were or were not facts known to the insured, and not known to them, which might make the vessel a less eligible risk, for they were going to take her, whatever she was, at a premium, the amount of which was already finally fixed. Mr. Milward's argument was, that they were not legally bound to do so; and that, therefore, when they entered into a substituted policy on a ship, they were entitled to hold it avoided for want of a disclosure which, in fact, would have made no difference. This would be to make the rule, that contracts of marine insurance are considered as uberrimæ fidei, a means in this case of working fraud. In fact, the case is exactly as if the underwriter had said, "I have finally made up my mind to take the policy on unalterable terms: nothing you can disclose to me will make the least difference, *and therefore you need disclose nothing.*" It is true the last words were not expressed, but they were evidently implied.

The only remaining point arises, therefore, on the misnomer of the vessel, which was called in the policy the *Socrates*, when, in

1871

IONIDES v. PACIFIC INSURANCE CO.

fact, she was the *Socrate*. But the rule of law, both in England and America, is that stated by Mr. Phillips (1), that if the description in the policy designates the subject with sufficient certainty, or suggests the means of doing it, a mistake of the name of the ship or of other particulars will not defeat the contract. In *Le Mesurier* v. *Vaughan* (2), where the broker had received instructions to insure goods by an American ship called the *President*, and by mistake insured as on a ship called the *American President*, it was held that, it being clearly proved by the invoice and letter of instructions that the goods were on the *President*, and that the name was a mistake, the plaintiffs might recover. It is true that in the judgment some weight seems to have been given to the expression contained in the ordinary Lombard Street policy, "or by whatever other name or names the said ship should be called," and that those words are omitted in the form of the policy used by the defendants in the present case. But we think this far too narrow a ground, and that the real ground of the decision is that which is expressed by Lord Ellenborough, that where it can be proved that it is a clear mistake, and the underwriter cannot be prejudiced by the mistake, it is of no consequence. The jury here have found, and were justified in finding, that neither party cared what the name of the ship was, as they meant to insure the goods by the ship on which they were really shipped.

When the other policy for the 12*l.* was made, it appears plainly that the underwriter really believed that the ship was the Norwegian ship, and that was a matter very material to the risk, and the underwriter was free to accept or refuse that risk, and therefore the mistake in the name was of importance.

We think, therefore, that the rule should be made absolute to enter a verdict for the defendants on the 2nd and 6th pleas, so far as they relate to the 4th count, and discharged as to the residue.

Rule accordingly.

Attorneys for plaintiffs: *Stibbard & Beck.*
Attorneys for defendants: *Holmer, Robinson, & Co.*

(1) Phillips on Insurance, s. 430. (2) 6 East, 382.

DAVIS *v.* HEDGES. 1871.
July 6.

Action—Damages in Reduction of Claims in former Action—Cross Action.

In an action for damages for the non-performance and improper performance of certain work which the plaintiff had employed the defendant to do, the defence set up was that the defendant had sued the plaintiff for the price of the work alleged to have been improperly done, and the plaintiff had settled by paying the whole amount then sued for; and that, as the plaintiff might have given the non-performance and the defective performance complained of in evidence in reduction of damages, the plaintiff was precluded from bringing a cross action for them:—

Held, that though the plaintiff might have used the causes of action for which he sued in reduction of the claim in the former action, yet he was not bound to do so, but might maintain a separate action for them.

CASE stated on appeal from the County Court of Oxfordshire, holden at Oxford.

The action was brought to recover the sum of 42*l.* 19*s.* 6*d.*, being damages sustained by the plaintiff for the improper performance of certain work agreed to be done by the defendant for the plaintiff at his house, Burford, Oxon, under a building contract, and for not performing the work according to certain specifications and also for removing certain partitions and appropriating certain materials.

After the opening of the plaintiff's case, it was stated to the judge that the defendant had brought an action in the Court of Common Pleas against the plaintiff for the recovery of the price of the work under the contract, and had recovered the whole amount.

It was, however, contended on behalf of the plaintiff that he was not in any way prejudiced in the present action, which was one for damage for the non-fulfilment of a contract, by the fact that the defendant had brought a previous action against him in a superior court, to recover the price of the work done, the improper performance of which was the subject-matter of the present case: in other words, that the plaintiff either could not, or in the alternative was not bound to set off the subject-matter of the present action in and to the previous action of the defendant, but could now bring his cross action. The judge decided the contrary, and nonsuited the plaintiff.

1871

DAVIS v. HEDGES.

June 14. *Bosanquet* for the plaintiff.

Sawyer for the defendant.

The arguments sufficiently appear in the judgments of the Court.

The following cases in addition to those mentioned in the judgments, were cited: *Rigge* v. *Burbidge* (1); *Street* v. *Blay* (2); *Poulton* v. *Lattimore* (3); *Rossi* v. *Bailey*. (4)

Cur. adv. vult.

July 6. HANNEN, J. This was an appeal from the County Court of Oxford, argued before my Brothers Blackburn and Lush and myself. I have to deliver the judgment of my Brother Blackburn and myself.

The plaint was for damages for the non-performance and improper performance of certain works which the plaintiff had employed the defendant to execute.

The defence set up was, that the defendant had sued the plaintiff for the price of the work now alleged to have been improperly done, and that the plaintiff had settled by paying the whole amount then sued for; and as the plaintiff might have given the non-performance and defective performance now complained of in evidence, in reduction of damages, the plaintiff was precluded from bringing a cross action for that which he might have availed himself of as a defence to the former suit.

The county court judge decided in favour of the defendant, holding that all the damages now sued for might have been used in reduction of damages in the former action, and that for anything which might have been so used no cross action could be maintained.

We are of opinion that the decision of the learned judge was erroneous.

The course of the decisions on this point is clearly traced by Parke, B., in delivering the judgment of the Court in *Mondel* v. *Steel* (5): "Formerly it was the practice, where an action was brought for an agreed price of a specific chattel, sold with a war-

(1) 15 M. & W. 598.
(2) 2 B. & Ad. 456.
(3) 9 B. & C. 259.
(4) Law Rep. 3 Q. B. 621.
(5) 8 M. & W. at p. 870.

ranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for the breach of warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done as any consequential damage, might have been recovered . . . But after the case of *Basten* v. *Butter* (1) a different practice, which had been partially adopted before in the case of *King* v. *Boston* (2), began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to shew that the chattel, by reason of the non-compliance with the warranty in the one case, and the work, in consequence of the non-performance of the contract, in the other, were diminished in value" . . . "In all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and it is competent for the defendant in all of those, not to set off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by shewing how much less the subject-matter of the action was worth by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more."

The particular point decided in *Mondel* v. *Steel* (3) was, that a person who has in fact obtained, in an action brought against him, an abatement of the price of work done, by reason of a breach of contract in its execution, is not precluded from suing for special damage resulting from the breach of contract; but it leaves undecided the question whether he was *bound* to obtain the abatement in the action in which he was a defendant, or might recover it as damages in a cross action. The expression of Parke, B., which was a good deal relied on in the argument, that "to the extent that he obtains, or is *capable of obtaining*, an abatement of

(1) 7 East, 479. (2) 7 East, 481, n.
(3) 8 M. & W. 858.

1871

DAVIS v. HEDGES.

price, he must be considered as having received satisfaction for the breach of contract," has reference to the facts of the case in which the plaintiff did claim and did obtain an abatement. It is clear that before any action is brought for the price of an article sold with a warranty, or of work to be performed according to contract, the person to whom the article is sold, or for whom the work is done, may pay the full price without prejudice to his right to sue for the breach of warranty or contract, and to recover as damages the difference between the real value of the chattels or work, and what it would have been if the warranty or contract had not been broken. Is there any reason why he should be deprived of this right by the mere fact of his opponent having commenced an action for the price?

We think that there is none, and that there are some strong reasons why he should not.

It appears, from the passages above cited from the judgment in *Mondel* v. *Steel* (1), that the present practice of allowing the defence of the inferiority of the thing done to that contracted for to be applied in reduction of damages was introduced (on the same principle as the Statutes of Set-off were passed) for the benefit of defendants. It would greatly diminish the benefit, and in some cases altogether neutralise it, if the defendant was not allowed an option in the matter. The hypothesis is, that the plaintiff suing for the price is in default. The conditions on which he can bring his action are usually simple and immediate. The warranted chattel has been delivered, or the work contracted for has been done, and the right to bring an action for the price, unless there is some stipulation to the contrary, arises. On the other hand, the extent to which the breach of warranty or breach of contract may afford a defence is usually uncertain; it may take some time to ascertain to what amount the value of the article or work is diminished by the plaintiff's default. It is unreasonable, therefore, that he should be able to fix the time at which the money value of his default shall be ascertained. In many cases the extent to which the value of works may be diminished by defect in their execution may be altogether incapable of discovery until some time after the day of payment has arrived. Surely the right to

(1) 8 M. & W. at p. 870.

redress for the diminution of value, when discovered, ought not to depend on the accident whether the contracting party in the wrong had or had not issued a writ for the price.

Another inconvenience which would result from holding that the inferiority of the thing done to that contracted for *must*, if an action be commenced, be used by way of defence, is, that instead of furthering the object for which this defence was permitted, namely, the prevention of circuity of action, it would in many cases tend to complicate and increase litigation. The cases are, perhaps, rare in which the consequences of defective performance of work are limited to the depreciation of the value of the work done; they usually involve consequential damage by reason of the necessity of repairing the defective work; and for this the case of *Mondel* v. *Steel* (1) decides a separate action must be brought. Parke, B., there says: "All the plaintiff could by law be allowed in diminution of damages on the former trial was a deduction from the agreed price, according to the difference at the time of delivery between the ship as she was, and what she ought to have been according to the contract; but all claim for damages beyond that *on account of the subsequent necessity for more extensive repairs* could not have been allowed in the former action, and may now be recovered." So that two litigations instead of one would be frequently necessary, with the additional inconveniences that it would be very difficult to discriminate in each action between that which ought to be allowed in diminution of price, and that which should be compensated for as special damage.

We do not mean to throw the least doubt on the cases which establish the general rule, that where a party to a litigation has the opportunity to raise some question, and does not avail himself of it, he is in no better position than if he had raised it. None of these cases, however, are really in point, except the opinion of Lord Ellenborough in *Fisher* v. *Samuda* (2); but at that time it had not been quite determined, as it now is, that *part* of the cross cause of action could be given in evidence in reduction of damages, and that part could not. This rather anomalous state of things the history of which is explained in the judgment in *Mondel* v. *Steel* (3), takes this particular case out of the general rule, and

(1) 8 M. & W. 858, 872. (2) 1 Camp. 190. (3) 8 M. & W. 858.

1871

DAVIS v. HEDGES.

we think it obliges us to determine it in the way that we think most consistent with principle and convenience.

We have, though not without some doubt, come to the conclusion that the better rule is, that the defendant has the option, if he pleases, to divide the cause of action, and use it in diminution of damages, in which case, as Parke, B., says, he is concluded to the extent to which he obtained, or was capable of obtaining, a reduction; or he may, as in the present case, claim no reduction at all, and afterwards sue for his entire cause of action.

We may further observe that, in the present case, a part of what is claimed in the particulars could not have been used in reduction of damages at all.

We think, therefore, that there must be a new trial.

LUSH, J. I cannot concur in the last observation, for although the plaint contains an item of claim, which could not have been used in reduction of damages, that item does not appear to have been insisted on, or brought to the notice of the learned judge as standing on a different ground from the others. In all other respects I entirely agree with my learned Brothers. I would, however, point out what appears to me an essential distinction between this case and the class of cases including *Marriot* v. *Hampton* (1); *Hamlet* v. *Richardson* (2), and *Brown* v. *M'Kinally* (3). In *Marriot* v. *Hampton* (1), a writ had been issued by the defendant to recover money for goods which had been sold by him to the plaintiff. The debt had been paid by the plaintiff, and a receipt had been given to him. Not being able to find the receipt, he was obliged to pay the money again. He afterwards found the receipt, and brought an action to recover back the money paid. It was held he could not recover it back. In *Hamlet* v. *Richardson* (2), the plaintiffs sought to get back a sum paid, as they alleged, to the defendant by mistake in the course of some transactions arising out of a charterparty. Before making the payment, a writ had been issued against them, and the Court held that, the money, having been paid under legal process, could not be recovered back. So in *Brown* v. *M'Kinally* (3), the plaintiff was

(1) 7 T. R. 269. (2) 9 Bing. 644.

(3) 2 Esp. 278.

not allowed to recover back money which he had paid to the defendant, though he told him at the time of payment that he paid it without prejudice, and meant to bring an action to recover back the surplus so paid. In these cases, the sole ground of action was the payment, and what the plaintiffs sought by the action was to undo that payment, and to place themselves in statu quo. In the present case, the cause of action is the breach of contract; that cause of action existed before and was independent of the payment; and the only question is, whether the plaintiff is precluded from recovering by reason of his not having set up that breach of contract in defence to the former action. If he had set it up, and either failed to substantiate it, or obtained an inadequate reduction, his right of action would have been extinguished. But not having done so, his right of action remains.

Judgment for the plaintiff accordingly.

Attorney for plaintiff: *Mallam.*
Attorney for defendant: *Boyle.*

BROWN *v.* NUGENT.

July 6.

House kept for Public Dancing, Music, or other Public Entertainment—Licence for Music only—25 Geo. 2, c. 36, ss. 2, 3.

Under 25 Geo. 2, c. 36, s. 2, which empowers justices to license a house for public dancing, music, or other public entertainment of the like kind, the justices have a discretion to grant a licence for one of the purposes only, viz., music; and the keeper of a house, with a music licence only, is liable to the penalty for keeping a house without a licence, if he permit public dancing in the house.

Affirmed in Exch. 37 L. T. 588

ACTION to recover a penalty of 100*l.*, under 25 Geo. 2, c. 36 (1).

Plea: General issue by statute 21 Jas. 1, c. 4, s. 4.

(1) 25 Geo. 2, c. 36, s. 2. "Any house, room, garden, or other place kept for public dancing, music, or other public entertainment of a like kind, in the cities of London and Westminster, or within twenty miles thereof, without a licence had for that purpose from the last preceding Michaelmas Quarter Sessions of the Peace, to be holden for the county, city, &c., in which such house, room, garden, or other place is situate (who are hereby authorized and empowered to grant such licences as they in their discretion shall think proper), signified under the hands and seals of four or more of the justices there

1871

BROWN v. NUGENT.

At the trial before Lush, J., at the Middlesex sittings in Hilary Term, it was proved that the defendant was the proprietor of the Cambridge Music Hall, Commercial Street, Shoreditch, in the county of Middlesex, and held a licence for public music under 25 Geo. 2, c. 36. On the 16th of November, 1870, the defendant permitted, as it was alleged for the plaintiff, public dancing in his house by the performance of a ballet divertissement, called "The Revels of the Sylphides." Over the entrance of the premises was an inscription: "Licensed pursuant to Act of Parliament, 25 Geo. 2, c. 36."

It was contended on behalf of the defendant that he had incurred no penalty as he held a licence under 25 Geo. 2, c. 36; and also that the performance was a musical entertainment to which dancing was only an auxiliary.

The learned judge left two questions to the jury: first, was the music auxiliary to the dancing, or vice versâ; secondly, did the defendant intend the ballet to be a part of a regular and continuous entertainment?

The jury found that the music was auxiliary to the dancing, and that the house was kept for dancing and music. The judge directed

assembled, shall be deemed a disorderly house or place . . . and it shall and may be lawful to and for any constable . . . authorized by warrant . . . to enter such house or place, and to seize every person who shall be found therein, in order that they may be dealt with according to law; and every person keeping such house, . . . without such licence as aforesaid, shall forfeit the sum of 100*l*."

Sect. 3. "That in order to give public notice what places are licensed pursuant to this Act, there shall be affixed and kept up in some notorious place over the door or entrance of every such house . . . kept for any of the said purposes, and so licensed as aforesaid, an inscription in large capital letters, in the words following, viz.: 'Licensed pursuant to Act of Parliament of the twenty-fifth of King George the Second;' and that no such house . . . kept for any of the said purposes, although licensed as aforesaid, shall be open for any of the purposes before the hour of five in the afternoon; and that the affixing and keeping up of such inscription as aforesaid, and the said limitation or restriction in point of time, shall be inserted in and made conditions of every such licence; and in case of any breach of either of the said conditions, such licence shall be forfeited and shall be revoked by the justices of the peace in their next general and quarter sessions and shall not be renewed; nor shall any new licence be granted to the same person or persons, or any other person on his or their or any of their behalf, or for their use or behalf, or for their use or benefit, directly or indirectly, for keeping any such house . . . for any of the purposes aforesaid."

a verdict for the defendant, giving leave to move to enter a verdict for the plaintiff. 1871

BROWN v. NUGENT.

A rule was obtained accordingly, on the ground that on the facts found by the jury the verdict ought to be entered for the plaintiff, it having been found by them that the defendant kept open his house for dancing, not having a licence for that purpose under 25 Geo. 2, c. 36.

June 12. *H. S. Giffard, Q.C.*, and *Ingham*, shewed cause. The verdict was rightly entered for the defendant. He had a licence under the Act. How can it be said of a man who has a licence for one of the things for which a licence is required by the Act that he keeps an unlicensed house? Section 3 contemplates conditions being inserted in a licence, and if the justices in their discretion limit the licence to music, and make it a condition on which they grant the licence, the holder, by allowing dancing, a different kind of entertainment, may commit a breach of the condition, and his licence may be forfeited, or some particular punishment may attach to the breach of the condition; but if the holder of a licence for music only allows dancing to take place in his house, it does not thereby become disorderly so as to make him liable to a penalty. The object of the legislature was to have these houses under the superintendence of the police, and to prevent the assembling of disorderly characters; and it would be an unreasonable construction to hold that the breach of a condition of the licence makes the house a disorderly house. By s. 2, constables are empowered to seize all persons found in unlicensed houses; and in order to give the public notice what houses are licensed, an inscription is to be affixed over the entrance of the house, which is a general inscription, and does not specify the purpose for which the house is licensed. If the house is to be considered as an unlicensed house and disorderly, innocent persons who were in the house, believing it to be duly licensed for the entertainment there given, would be liable to be arrested, on the ground that the entertainment given was different from that for which the licence had been obtained. This could not be the intention of the legislature. If the justices could grant limited licences, the inscription would be specific and describe the kind of entertainment for which a licence had been obtained.

1871

BROWN v. NUGENT.

H. T. Cole, Q.C., and *Thomas*, in support of the rule. The justices have power either to grant licences for one of the kinds of entertainment or they have not such power. If they have not the power, the defendant has no licence and has incurred the penalty; if they have the power, the defendant having received a licence for music only, has kept his house for a different kind of entertainment, viz., dancing, and is therefore liable to the penalty. The justices have power to grant a licence for one purpose only; and it has been the practice for justices to grant such a licence. The words of s. 2 are in the disjunctive, "any house kept for public dancing, music, or other public entertainment of a like kind," and the justices are empowered to grant such licences as they in their discretion shall think proper. This language shews that a licence granted for music only would be a valid licence, and as the licence is granted for music alone and not for dancing, the penalty has been incurred.

Cur. adv. vult.

July 6. The judgment of the Court (Cockburn, C.J., Lush and Hannen, JJ.), was delivered by

HANNEN, J. This action is for penalties under 25 Geo. 2, c. 36, for keeping a house of public entertainment, not being duly licensed. The facts are that the defendant had a licence for music, but not for dancing; and the question whether or not this penalty can be recovered depends upon whether the defendant was the keeper of a house without the necessary licence for the entertainment which he gave there, that of dancing. It was argued that the statute only gives to the justices the power of granting one species of licence, and therefore if they granted a licence at all it must be a licence for public dancing as well as for music; and it was contended that that must be the meaning of the Act, because the Act prescribes but one form in which the person keeping the house shall announce to the world that he has a licence. The words of the announcement given in the Act are, "Licensed pursuant to Act of Parliament, 25 Geo. 2," saying nothing about the purposes for which the house is licensed; and as it is said in the section that this notice is to be put up in order that public notice may be given what places are licensed pursuant to the Act, and as persons

found in a house not licensed are liable to be taken up by the police and dealt with summarily, it was argued that innocent persons might be convicted, if it was held that they were liable to be taken up, though they had the notice which the Act of Parliament directs should be given to them, indicating that this was a place in which they might safely be.

We, however, though not without some difficulty and doubt, have come to the conclusion that that is not the true construction of the Act. In the first place, we think that it is obvious that the considerations which would weigh with the magistrates in granting a licence for music alone are so very different from those which would weigh with them in granting a licence for music and dancing, that it would be mischievous if the magistrates were bound in all cases to grant a licence for both purposes. And we think that some weight is to be given to what was stated during the argument, and not denied, although evidence of the fact was not given on the trial, viz., that magistrates have been in the habit, ever since the passing of this Act, of granting separate licences for music and for dancing. Further, we find in the Act itself some indication that the legislature did contemplate the separation of these licences by s. 2, and particularly in s. 3, in which it is said when dealing with the consequences of a person keeping an unlicensed house, "nor shall any new licence be granted to the same person or persons, or any other person, on his or their behalf, or for their use or benefit, for keeping any such house for any of the purposes aforesaid." The statute therefore contemplated the possibility of licences being granted not for all but for any of the purposes enumerated. We think it would be but reasonable that there should be a power of granting a separate licence either for music or dancing; and we think that the words of the statute enables us to put that construction upon it.

The result is that the defendant, not being licensed for the purpose of the particular entertainment, viz., dancing, is liable to be sued for the penalty. The rule must be made absolute to enter a verdict for the plaintiff.

Rule absolute.

Attorneys for plaintiff: *Webster & Graham.*

Attorney for defendant: *Beard.*

1871
Feb. 1.

THE QUEEN ON THE PROSECUTION OF THE OVERSEERS OF ST. MARGARET AND ST. JOHN THE EVANGELIST, WESTMINSTER *v.* THE METROPOLITAN DISTRICT RAILWAY COMPANY. (1)

Poor-rate—Deficiency in Parochial Rates—Liability of Railway Company to make good deficiency in Rates—27 & 28 Vict. c. cccxxii. s. 80.

By a railway Act it was enacted that "while the company are possessed under this Act of any lands assessed, or liable to be assessed, to any poor-rate," and certain other rates, "they shall, from time to time, until the railways or the works thereof are completed and assessed or liable to be assessed, be liable to make good the deficiency in the assessment for such rates by reason of these lands being taken or used for the purposes of the railways or other works by this Act authorized; and the deficiency shall be computed according to the rental at which those lands with any buildings thereon were rated at the time of the passing this Act." . . .

The company were empowered under the Act to make certain railways and works forming one entire system, and they took and used certain land in the parish of W. for making a part of the railways and works. The part of the railways and works in the parish of W. was completed and opened for traffic; but other parts of the entire system were not completed. The assessment of the land with the railway and works to the poor-rates and other rates in the parish of W. was below the assessment of the land with buildings thereon before the Act was passed:—

Held, that the company were liable to make good the deficiency in the assessment until the entire system of railways was completed.

CASE stated after writ of mandamus without pleadings.

The writ commanded the defendants to pay to the overseers of the poor of the united parishes of St. Margaret and St. John, Westminster, the sum of 678*l.* 4*s.* 9*d.* deficiency of poor-rates in the year 1868, and the sum of 1350*l.* 13*s.* 10*d.* deficiency of poor-rates in the year 1869, and also the sum of 521*l.* 9*s.* 7*d.* deficiency of metropolitan rates in 1868, and the sum of 701*l.* 19*s.* 3*d.* for the deficiency of metropolitan rates in the year 1869, pursuant to s. 80 of 27 & 28 Vict. c. cccxxii.

The defendants are a railway company incorporated by the Metropolitan District Railways Act, 1864, and with respect to which company the Metropolitan District Railway Act, 1866, and the Metropolitan District Railway Act, 1868, were passed.

(1) Decided at the sittings after Hilary Term.

By section 16 of the Act of 1864 (27 & 28 Vict. c. cccxxii.), it was enacted as follows:—

The following are the railways and works authorized to be constructed under the powers of this Act:—

1. The railway numbered 32 on the plans deposited with respect to the Metropolitan District Railway, and called thereon Main Inner Circle, Brompton to Westminster Bridge, commencing in the parish of St. Mary Abbott, Kensington, near the junction of Alfred Place West and Pelham Road, in the Old Brompton Road, and terminating at or near South Street, Cadogan Terrace, in the parish of St. Luke, Chelsea, then so much of the railway numbered 1 on the plans deposited with respect to the Metropolitan Grand Union Railway as lies between Halsey Street, in the same parish, and the Broad Sanctuary, in the City of Westminster, and then so much of the railway numbered 32 as lies between the Broad Sanctuary and Bridge Court, about forty yards east of Cannon Row, Westminster, in the parish of St. Margaret, Westminster, together with a road or street in the parish of St. Mary Abbott, Kensington, from the Cromwell Road to Alfred Place West.

2. The railway numbered 33 (Main Inner Circle, Westminster Bridge to Cannon Street) commencing with railway No. 32 at its termination in St. Margaret, Westminster, and terminating at or near Turnwheel Lane, about twenty yards south of Cannon Street, in the parish of St. Mary Bothaw, in the city of London.

3. The railway numbered 34 (Main Inner Circle, Cannon Street to Fenchurch Street) commencing by a junction with railway No. 33, at its termination near Turnwheel Lane, and terminating at or near the point where the Blackwall Railway crosses Vine Street, in the parish of St. Botolph Without, Aldgate, in the city of London.

4. The railway and works completing the Main Inner Circle will be situated in Kensington, Chelsea, Westminster, the bed of the Thames, Blackfriars, various parishes in the city of London, Barking, the precincts of the Tower, and St. Katherine, and the Minories.

5. So much of railway numbered 6 (Main Outer Circle) as lies between Gloucester Road and the junction therewith of line No. 9, and between the junction therewith of line No. 7, and the Kensington Road, in the parish of St. Mary Abbott, Kensington.

6. The railway numbered 6 A. (Junction Spur), commencing at or near a point in Gloucester Road, 60 yards south of Cromwell Road, in the parish of St. Mary Abbott, Kensington, and terminating about midway between Alfred Place West and Pelham Place.

7. The railway numbered 7 (West London Junction), commencing by a junction with railway No. 6 at a point near the north-east corner of St. Margaret and St. John, Westminster Union Workhouse, in the parish of St. Mary Abbott, Kensington, and terminating by a junction with the West London Extension Railway at a point about sixty yards south of the Richmond Road, in the parishes of St. Mary Abbott, Kensington, and Fulham, in Middlesex. . . .

8. The railway numbered 8 (Junction Spur), commencing by a junction with railway No. 7, at or near a point in the Warwick Road, 300 yards or thereabout north of the said Richmond Road, in the parish of St. Mary Abbott, Kensington, and terminating by a junction with the West London Extension Railway, 600

1871

THE QUEEN v. METROPOLITAN DISTRICT RAILWAY CO.

yards north of the said Richmond Road, in the parish of St. Mary Abbott, Kensington, and Fulham. . .

9. The railway numbered 9 (Junction Spur), commencing by a junction with railway No. 6, at about seventy yards north-west of the point where Cromwell Road and Red Field Lane unite in the parish of St. Mary Abbott, Kensington, and terminating by a junction with railway No. 7 at a point about forty yards north of the said Red Field Lane, and 450 yards west of its junction with Cromwell Road aforesaid in the same parish.

By s. 80, "If, and while the company are possessed under this Act of any lands assessed or liable to be assessed to any sewers rate, consolidated rate, poor-rate, police rate, main drainage rate, church-rate, tithe-rate, or other parochial or ward rate, they shall from time to time until the railways (1) or the works thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates by reason of those lands being taken or used for the purposes of the railways or other works by this Act authorized, and the deficiency shall be computed according to the rental at which those lands, with any buildings thereon, were rated at the time of the passing of this Act, or according to the amount of the tithe-rate payable in respect of such property."

By s. 7 of the Metropolitan District Railway Act, 1866, the defendants obtained power to purchase certain additional lands, and by s. 9, s. 80 of the Act of 1864 was made applicable to the additional lands so to be acquired.

By s. 5 of the Metropolitan District Railway Act, 1868, the defendants were empowered to take certain additional lands in the parish of St. Margaret, Westminster; and by the 6th section of that Act s. 80 of the said Act of 1864 was made applicable to the said lands.

The rates for the relief of the poor of the united parishes of St. Margaret and St. John the Evangelist, Westminster, are made under an Act of 25 Geo. 2, and are levied as rates under 43 Eliz. c. 2.

On the 30th of May, 1868, a poor-rate was made.

On the 9th of March, 1868, a general rate, a sewers rate, and a rate for the Metropolitan Board of Works expenses, were made

7 L. 253,

(1) By s. 2, "In this Act . . . the words 'the undertaking,' or 'the railways,' shall mean the railways and the works connected therewith by this Act authorized to be constructed."

1871

THE QUEEN v. METROPOLITAN DISTRICT RAILWAY CO.

under the Metropolis Management Act, 1855, and the subsequent Acts of Parliament enlarging the powers thereof.

On the 19th of January, 1869, a main drainage rate was made; on the 15th of March, 1869, a rate for defraying the expenses of the Metropolitan Board of Works, a rate for defraying the expenses of the said board as to sewers, a general rate, and a sewers rate were made; and on the 10th of May, 1869, another poor-rate was made.

Part of the said railways and works authorized to be constructed by the Act of 1864, that is to say, so much of the railways and works mentioned in subs. 1 of s. 16 in the Act of 1864 as extends from the Vauxhall Bridge Road to Westminster Bridge, and so much of the railways and works authorized to be constructed by subs. 2 of s. 16 as extends from Westminster Bridge to Whitehall Place are, or when constructed will be, situated within the said parishes, and from the time when the poor-rate was made on the 30th of May, 1868, till now, defendants were possessed, under the Acts of 1864 and 1866, of divers lands which, at the time of the passing of the Acts, were assessed and liable to be assessed to the various rates hereinbefore mentioned. Prior to the passing of the said Act of 1864, houses and assessable buildings had stood upon the lands included in subs. 1 (though not upon the lands included in subs. 2) of s. 16 of the Act; but at the time of the making of the poor-rate on the 30th of May, 1868, these houses and buildings had been pulled down by the company, and the works were in progress, and the railways and works were being constructed in and through those lands.

On the 30th of May, 1868, part of the railways and works not in the said parishes was completed, and was open for public traffic; but up to the 24th of December, 1868, no part of the railways, or the works thereof, within the said parishes was completed, or assessed, or liable to be assessed as a railway or works, or had any rateable value.

On the 24th of December, 1868, a portion of the railways and works authorized by the Act (that is to say) the whole portion authorized by subsection 1 of s. 16 of the Act was substantially completed, and was opened for public traffic, and since that date passengers have been regularly carried along the whole length of

1871

The Great Northern Railway Company v. The Metropolitan Board of Works.

railway comprised in subsection 1 and to and from the stations on such length of railway, viz. between Westminster Bridge, St. James's Park, Victoria, Sloane Square, South Kensington, which stations were all opened for traffic on the 24th of December, 1868, and trains for the conveyance of passengers were regularly run from Westminster Bridge along the Metropolitan District Railway and along the Metropolitan Railway to Moorgate Street, without change of carriages, and in like manner back from Moorgate Street to Westminster, from that date.

The line of railway from the Westminster Bridge Station to South Kensington was in direct communication with several railways.

The portions of the railways and works mentioned in subsections 6 and 7 of s. 10 of the same Act of 1864, extending from the South Kensington Station to West Brompton, part of which, are situated in the said parishes, were completed and opened for public traffic on the 13th of April, 1869, after which the portion of the railways and works mentioned in subsection 1 was in direct communication therewith.

Other large portions of the railways and works authorized by the said Acts beyond the said parishes eastward are in a state of progress, but are not yet completed, assessed, or liable to be assessed as a railway or works, nor have the said portions any rateable value as railways.

The assessment and rateable value of any portion of the railways and works (if any such there be), which since Christmas, 1868, has become assessed or liable to be assessed within the said parishes, are below the rental at which the lands used and possessed by the defendants for that portion of the railway and works, with the buildings which stood thereon at the time of the passing of the said Act of 1864, were rated, and below the rateable value of such lands with the buildings thereon.

The questions for the opinion of the Court were:—1. Whether the defendants are liable to make good the whole of the deficiency in the assessment for the rates made in 1868 up to the making of the same rates in 1869, or whether they are liable to make good a proportional part of such deficiency only, viz., from the making of the rates in 1868 up to the 24th of December, 1868. 2. Whether

the defendants are liable to make good any and what part of the deficiency in the assessment of the said rates made in 1868.

1871.

The Queen v. Metropolitan Railway Co.

Denman, Q.C. (*F. M. White* with him), for the prosecution, contended that on the true construction of s. 81 the railways and works meant the whole railways which the company were empowered to make, and that the whole railways must be substantially completed before the liability of the company to make up the deficiency in the assessment ceased.

Sir J. B. Karslake, Q.C. (*Pinhorn* with him), for the defendants, contended that as soon as the land in the parish formerly occupied by houses was beneficially occupied by a railway it ought to be assessed at its then value as a railway; but land formerly occupied by houses and not beneficially occupied by a railway was to be assessed at its value before the railway took possession of it, and that under s. 81 the company were only liable to make up the deficiency in the assessment of land not beneficially occupied by them. He cited *Mayor of London* v. *St. Andrew's* (1); *Wheeler* v. *Metropolitan Board of Works* (2).

BLACKBURN, J. This case turns altogether upon s. 81 of the Metropolitan Central Railways Act, 1864, and, individually, the construction of it is not altogether unattended with difficulty, but still I have come to a clear opinion as to the meaning of the legislature.

It seems that when the company obtained their Act it was necessary that they should take possession of a great deal of property and in carrying out the powers conferred upon them by the statute they would necessarily destroy a large portion of rateable property. The legislature, therefore, was minded to protect the parishes through which the railway ought run from any loss consequent on any of the company's operations, and it is therefore provided by s. 81 that while the company are possessed of any lands previously assessed to any rates they shall from time to time, until the railways or the works thereof are completed be liable to make good the deficiency in the assessment for such rates by reason of those lands being taken for the purposes of the railway. So far the object of the legislature is very clear; inasmuch as the company

(1) Law Rep. 2 Q. B. 574. (2) Law Rep. 4 Ex. 358.

1871

THE QUEEN v. METROPOLITAN DISTRICT RAILWAY CO.

during the time they are making their railway destroy property which is rateable in the parish through which the railway passes, it provides that the parish shall not be deprived of the advantage which it derived from the rates it received, and that the company shall secure to the parish any deficiency arising by reason of the lands being taken for the purposes of the railway; and then the section further provides that the deficiency shall be computed according to the rental at which those lands, with any buildings thereon, were rated at the time of the passing of the Act. The legislature, therefore, fixes the time at which the actual rateable value is to be ascertained; and meanwhile a certain amount of rates is to be secured to the parish to make up any deficiency that may arise in consequence of the works of the railway, and the deficiency is to be made up to the parish until the time fixed by the legislature. What is the time up to which that deficiency is to be made good? It is clearly the time of the completion of the railways and the works authorized by their Act. The result is simply this: until the company complete their railways and works, so long they shall protect the parishes, so that each may be in the same position as it would have been if the company had not taken these lands.

7 H.L. 85.

7 Ex. 256

And there seems to me to be good reason for making the completion of the works the terminus at which the liability of the railway company shall cease: the reason is this, the rateability of any portion of the railway passing through any particular parish can never be accurately and fairly ascertained until the whole works have been completed; when the works have been completed, then the rates can be apportioned with justice to the parishes, and with justice to the company, and they cannot, until the completion of the railway, be fairly apportioned. Sir John Karslake, in his very ingenious and able argument suggested this construction of the section, namely, that what the legislature intended was that when any portion of the railway in the parish was completed, or rather was beneficially occupied by the company, that is, workable and worked, then that portion was to be assessed at its present value, and the remainder of the land not taken or beneficially occupied was to be valued at the rental which existed at the time of the passing of the Act. The infirmity as it seems to me of that suggestion is this:

Sir John Karslake was obliged to admit that in a certain contingency the parish would be the losers. If anything appears to me clear upon this enactment, it is that the legislature intended that the parish should not lose, and therefore I do not think that that construction, however ingenious, can fairly be put upon this section.

It was observed by my Brother Lush during the course of the argument, that, there being in the Companies Clauses Act (8 Vict. c. 18), which is incorporated with the present Act, a section (s. 133) framed somewhat in the same terms as the present section, the legislature seems to have been so desirous to protect the parishes that they inserted the present section, which contains words more stringent than those in the general Act.

I think, therefore, that the reasonable construction is that which I have put upon the section, and that our judgment must be for the prosecution.

LUSH, J. I am of the same opinion. I think it perfectly clear that this clause was introduced into the Act in the interest and for the benefit of the parishes to secure them from suffering any loss in respect of the property, which was to be taken for the making of the railways, until a certain event happened. The question depends upon ascertaining the event, upon which the liability of the company to make up any deficiency that there may be between the rates produced after beginning their works and the rates payable at the time of the passing of the Act is to cease. Now, this being a clause obviously introduced for the benefit of the parishes, we must construe any words in it which may be ambiguous in favour of the parishes, so as to further the obvious intention of the Act: and so dealing with it, it is perfectly clear that the clause has an application to the facts stated in the case which requires our judgment to be in favour of the parish. The words are, "while the company are possessed under this Act of any lands assessed or liable to be assessed to any sewers rate, consolidated rate, poor-rate," and so on, "they shall from time to time, until the railways or the works thereof are completed or assessed, or liable to be assessed, be liable to make good the deficiency in the assessment of such rates." It is contended on the one side that that means

1871

THE QUEEN v. METROPOLITAN DISTRICT RAILWAY CO.

"all the railways authorized by the Act," the whole scheme; on the other, that it means only that portion of the railways which covers the particular space of ground taken in the particular parish. It is admitted that the whole scheme has never been carried out; and it is admitted also that there is a deficiency. Therefore the question is, What is the event indicated by these words? If we look at the interpretation clause (s. 2), which says that the words in this Act, "the railways," shall mean "the railways and the works connected therewith by this Act authorized to be constructed," and interpolate that into the clause in question, it would read thus: "The company shall, until the railways and the works connected therewith by this Act authorized to be constructed are completed and assessed, or liable to be assessed, be liable to make good the deficiency:" and that must mean the whole of the railways authorized by this Act; and this is clear for the very obvious reason mentioned by my learned Brother, that until the whole scheme is completed, and its capacities for making profits fully developed, the parishes will not get the benefit which they ultimately will get when the scheme shall be developed, and these railways are able to connect themselves with other railways, and thereby have a large traffic. I cannot doubt, therefore, that the completion of the railways is the event contemplated; that event has not happened, there is still a deficiency between what the railway if it were rated now would yield, and the rates in respect of the houses which have been pulled down, and therefore there being that deficiency, and the event upon which the company are to be relieved not having happened, the company is still liable to make good the deficiency.

For these reasons I think that our judgment ought to be for the prosecution.

HANNEN, J. I am of the same opinion. It is to be observed that there is nothing in this Act which exempts the railway company from any rates to which they would otherwise be liable; therefore, if they bring into existence in any parish any property liable to be assessed, they must pay the rates in respect of that property. Then the object of s. 80 appears to be, while leaving them liable to pay rates for which they would otherwise be liable, to impose upon them a further liability, namely, to make

up the deficiency in the rates until a certain event has happened. The question is, what is that event? It is expressed thus: "Until the railways or the works thereof are completed." The natural meaning of these words is, "until the whole of the railways are completed;" and I can see no reason in the scheme of legislation for supposing that any other than that which is the ordinary and proper meaning of these words should be put upon them; on the contrary, for the reasons which have been given by my learned Brothers, it seems to me to be highly reasonable that the company should remain liable to make up the deficiency until the whole scheme of the railways shall have been completed, and until the whole line of railways shall have been put to its greatest advantage for all parties concerned, including, amongst others, the parishes through which it passes.

Judgment for the Crown.

Attorneys for prosecutors: *J. & C. W. Rogers.*
Attorneys for defendants: *Baxter, Rose, & Norton.*

THE QUEEN ON THE PROSECUTION OF THE NEATH CANAL COMPANY, APPELLANTS; *v.* THE OVERSEERS OF THE PARISH OF NEATH, RESPONDENTS.

May 31.

*Lighting and Watching Rate—Canal—*3 *&* 4 *Wm.* 4, *c.* 90, *s.* 33*—Houses, Buildings, and Property other than Land.*

By s. 33 of 3 & 4 Wm. 4, c. 90, the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any parish, shall be rated at, and pay a rate, in the pound three times greater than that which the owners and occupiers of land shall be rated at and pay for the purposes of this Act. The appellants were possessed of a canal and towing-path, bridges, and a dry dock, lined with masonry, used for repairing the canal boats:—

Held, that "property" meant things ejusdem generis with houses and buildings, and did not include a canal and towing-path; that the bridges and dry dock were accessories to the canal and must be considered part thereof; and that the whole ought to be rated as land.

CASE stated on an appeal to the Glamorganshire Quarter Sessions.

The appellants are the owners and occupiers of a canal, towing-

1871

THE QUEEN v. OVERSEERS OF NEATH.

path and premises, a portion of which is situate in the parish of Neath.

By a rate made in July, 1870, for the parish of Neath for the purposes of the watching and lighting of the parish under 3 & 4 Wm. 4, c. 90, the appellants were rated and required to pay as the occupiers of that part of the canal and towing-path lying and situate within the parish, the sum of 9*d.* in the pound on £161, the rateable value of the portion of the canal, towing-path and premises fixed by and mentioned in the rate.

The quarter sessions confirmed the rate, subject to the opinion of this Court.

By 31 Geo. 3, c. lxxxv., amended by 38 Geo. 3, c. xxx., the company of proprietors of the Neath Canal Navigation (the appellants) were incorporated by that style, and were authorized to make and maintain such canal, and to purchase, take, and hold lands and grounds for that purpose.

The land occupied by the canal and the towing-path have on, and belonging to them, as incident thereto, and necessary to the occupation and use thereof, certain posts for fastening the vessels and barges on the canal thereto, a paddle, or valve, used to shut off the water from one part of the canal for purposes of repair, stone bridges, culverts, and a dry dock, used only for repairing canal boats, lined with masonry, forming part of the canal and towing-path. There is a gas lamp erected upon the bridge carrying the turnpike road over the canal, which throws a light partly upon the turnpike road and partly upon the canal and towing-path. There are three other lamps erected upon a highway, which run parallel with the canal on the opposite side of the canal to the towing-path, but upon the side of the highway nearest to the canal, and which throw light upon the highway and upon the canal and towing-path. There are two other lamps upon or adjacent to the appellants' towing-path, which also throw light upon the canal and towing-path. The distance from the first or turnpike road lamp to the first of the three highway lamps is about 330 yards, the other lamps are at distances of from sixty to eighty yards apart, the whole being within a distance of three-eighths of a mile, while the total length of the canal in the town of Neath is about one and a half miles.

By 3 & 4 Wm. 4, c. 90, s. 32, it was enacted, "that as soon as the inspectors have been elected it shall be lawful for them, or any two or more of them, from time to time, to issue an order under their hands to the overseers of the poor of any parish to which the provisions of this Act shall be extended, by which order they shall require the overseers to levy the amount mentioned in the said order;" and by s. 33, "That the overseers shall, for the purpose of collecting, raising, and levying the rate necessary for the purposes of this Act, proceed in the same manner, and have the same powers, remedies, and privileges, as for levying money for the relief of the poor in the said parish: Provided always that the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish, shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at, and pay for the purposes of this Act." And by s. 34, "That it shall be lawful for the overseers of the poor of any such parish, and they are hereby required, whenever, according to the rate made for the relief of the poor, one and the same person shall be rated in one sum in respect of land, and also of houses, buildings, and other property, to cause such land and also such houses, buildings, and other property, to be separately assessed, and the sum hereby authorized to be levied shall be assessed accordingly. Provided always, that every court-yard, yard, or garden, such garden not being a market-garden or nursery-ground, shall be included in and make part of the assessment to be made on the house, buildings, or other property to which they may be respectively attached."

This Act was adopted in the parish of Neath many years ago, and has ever since continued, and now is in force therein.

The land occupied by the canal and towing-path, and premises in the parish of Neath, the property of the company, has been assessed for the relief of the poor at the rateable value of 161*l.*, and the same was adopted and acted upon in the rates made for the purposes of the watching and lighting of the parish of Neath under the provisions of the Act.

In the last of such rates, made in and for the parish of Neath, in the month of July, 1870, the rateable value of the portion of the canal and towing-path and premises in the parish was assessed

1871

THE QUEEN v. OVERSEERS OF NEATH.

at the sum of 161*l.*, but rated at the house-rate, namely, 9*d.* in the pound, and not at 3*d.* in the pound, which was the rate in the pound at which the owners and occupiers of the land within the parish were rated by the assessment committee.

It was admitted and taken that the rateable value of the company's property, the subject of the appeal, was correctly assessed at the sum of 161*l.*; but it was contended on behalf of the appellants, that on the state of facts above mentioned and set out, the land occupied by the portion of the canal and towing-path and premises was properly rateable under the provisions of 3 & 4 Wm. 4, c. 90, as land only, and not as houses, buildings, and property other than land.

The Court of Queen's Bench was to be at liberty to draw inferences of fact.

The question for the opinion of the Court was, whether the principle of assessment adopted by the respondents was correct.

H. G. Allen, and *E. J. Dunn*, for the respondents. The question is, are the canal and towing-path to be considered land within the meaning of 3 & 4 Wm. 4, c. 90, s. 33? Land, in the proviso, means land used for agricultural purposes: *Reg.* v. *Midland Ry. Co.* (1); and *Peto* v. *Overseers of West Ham* (2). Agricultural land produces a much smaller return than that applied to the purposes of trade and commerce. Land is less altered by its appropriation to a railway than to a canal; yet by laying iron rails upon it, it becomes property other than land: *Reg.* v. *Midland Ry. Co.* (1). Although that case was decided on a different statute, yet the reasoning of the judgment supports the respondents' contention; and that case was recognized as good law by the majority of the Court in *Peto* v. *Overseers of West Ham* (2). A further ground why land in tillage should be rated at a less sum, is that it derives a less benefit from lighting and watching, whereas watching is important for the protection of cargoes passing along the canal, and lighting is useful for its navigation; therefore, canal and towing-paths are included in the words "other property." In *Peto* v. *Overseers of West Ham* (2), a case on this section, the Victoria Docks were held rightly rated at the higher amount, as being property other than land; and that

(1) 4 E. & B. 958. (2) 2 E. & E. 144; 28 L. J. (M.C.) 240.

is a much stronger case than the present, although it must be admitted that Erle, J., was of a different opinion.

G. B. Hughes and *J. W. Bowen*, for the appellants, were not called upon.

COCKBURN, C.J. I am of opinion that the canal and its accessories must be considered as comprehended in the word "land." In *Peto* v. *Overseers of West Ham* (1) the circumstances were different from those in the present case, for the dock there was subsidiary to the warehouse; and notwithstanding the judgment of Erle, J., I am not prepared to say that the decision of the majority was not right. In the present case the canal is used for traffic only, and the masonry lining the banks is a part of the canal itself. The bridges are of no benefit to the canal, but were erected for the convenience of the public; the posts are put up for the purposes of navigation; the dock, at first sight, might stand on a different ground, but when it is seen that it is used to repair the barges, I think it must also be deemed to be a part of the canal. We must treat the canal and its accessories as land covered with water, and my opinion is that it ought to be assessed on the lower scale.

BLACKBURN, J. The question depends on s. 33 of 3 & 4 Wm. 4, c. 90. In legal language "land" includes houses and buildings; but it is plain that the legislature meant "land" to comprehend one class of things, and "houses, buildings, and property" to comprehend another class. In order to support the contention of the respondents the canal must be comprehended within the term "property;" but according to the ordinary rule for construing statutes, the word "property" can include only things ejusdem generis with those described by "houses and buildings;" and a canal is clearly not ejusdem generis with a house or building. Two cases were cited—*Reg.* v. *Midland Ry. Co.* (2), which is not in point, and *Peto* v. *Overseers of West Ham.* (1) In this last case the dock was considered as part of the whole undertaking, which consisted of the dock and the buildings adjoining. The majority of the Court were of opinion that the dock was as much a part of the buildings as a courtyard is of a house, and was, therefore, ancillary

(1) 2 E. & E. 144; 28 L. J. (M.C.) 240. (2) 4 E. & B. 958.

1871

THE QUEEN v. OVERSEERS OF NEATH.

to them—and this was the ground on which the judgment proceeded—and that therefore the dock must be rated, together with the buildings, at the higher rate. On that ground I think the majority were right. That case does not govern the present.

MELLOR, J. I am of the same opinion. This case is distinguishable from *Peto* v. *Overseers of West Ham.* (1) Lord Campbell, C.J., there says, the dock forms one undertaking and one establishment with the jetties and warehouses; and this seems to be the ground of the decision. I agree with my Brother Blackburn, that, in order to rate the canal at the higher rate, it ought to have been proved to be ejusdem generis with "houses and buildings;" and although the dock is lined with masonry, that cannot be considered as making it a building.

LUSH, J. I also agree that this case is distinguishable from *Peto* v. *Overseers of West Ham* (1) on the ground already stated; and *Reg.* v. *Midland Ry. Co.* (2) has no application to the present case, it being a decision on a different statute. There is nothing in s. 33 to warrant us in holding that "land" is confined to agricultural land.

Order of Sessions quashed.

Attorneys for appellants: *Sawbridge & Wrenhouse.*
Attorney for respondents: *James Kempthorne.*

(1) 2 E. & E. 144; 28 L. J. (M.C.) 240. (2) 4 E. & B. 958.

EVANS, TRUSTEE OF BENNETT, A BANKRUPT *v.* HALLAM. 1871

June 2.

Bankrupt—Notice of Act of Bankruptcy—Execution Creditor—32 & 33 Vict. c. 71, s. 95, subs. 3.

The notice of an act of bankruptcy, in order to invalidate an execution, under s. 95, subs. 3, of 32 & 33 Vict. c. 71, ought to convey specific information as to the acts constituting the act of bankruptcy, and ought not to leave room for doubt. A notice stating circumstances, which may or may not amount to an act of bankruptcy, is insufficient.

H. had obtained judgment against B., a non-trader, and issued a writ of fi. fa. The sheriff seized thereunder certain goods of B. Prior to the seizure, B. had executed a deed of assignment of all his estate and effects to W. for the benefit of B.'s creditors, and thereby committed an act of bankruptcy. On the day after the seizure, the attorneys of B. wrote to the attorney of the execution creditor a letter as follows:—"B. made an assignment of what goods he had, and it was arranged that his daughter should raise the money, but this we find was never finally arrived at." The sheriff sold the goods under the execution; and B. was adjudicated a bankrupt on the next day.

Held, that the letter of the attorneys was insufficient as a notice of the act of bankruptcy; and that the execution creditor was entitled to the proceeds of the sale.

CASE stated under the Common Law Procedure Act, 1860.

This is an interpleader issue between I. M. Hallam, executrix of John Hallam, deceased, and John Evans, trustee under the Bankruptcy Act, 1869, of John Bennett, a bankrupt.

John Hallam obtained judgment by default upon a writ issued under the Summary Procedure on Bills of Exchange Act, 1855, upon a bill of exchange for 72*l.* 18*s.*, against John Bennett, who is a farmer and non-trader; but before execution had issued upon the judgment John Hallam died.

In February, 1870, I. M. Hallam, as executrix, revived the judgment, and a writ of fi. fa. was issued upon the judgment, under which the sheriff of Staffordshire, on the 26th of February, 1870, seized certain goods in the possession of John Bennett.

John Bennett had on the 17th of November, 1869, executed a deed of assignment of all his estate and effects to one Thomas Woodward, for the benefit of his, John Bennett's creditors, and thereby committed an act of bankruptcy. The deed was intended to operate under the Bankruptcy Act, 1861; but although signed by some of the creditors of John Bennett, it was never signed by

1871

EVANS v. HALLAM.

a sufficient proportion in number and value of his creditors to make it a valid and operative deed under the Act, nor was it registered under the Act.

Execution was put in by the sheriff under the writ of fi. fa. on the 26th of February, 1870. On the next day the attorneys of John Bennett wrote and sent to the attorney of the execution creditor a letter as follows:—

"Uttoxeter, 27th February, 1870. We received your letter this morning. We were in error about the goods having been sold; Bennett made an assignment of what goods he had, and it was arranged that his daughter should raise the money, but this we find was never finally arrived at."

On the 1st of March, 1870, the attorneys of John Bennett wrote and sent to the attorney of the execution creditor a letter as follows:—"We shall present a petition for adjudication to-day."

On the 1st of March, 1870, John Bennett filed, in the manner prescribed by the Bankruptcy Act, 1869, a declaration admitting his inability to pay his debts, and on the same day a petition praying that John Bennett might be adjudged a bankrupt, was presented by Thomas Woodward, to the Staffordshire Bankruptcy Court, holden at Burton-on-Trent, and the petition was ordered to be heard on the 10th of March, 1870, on which day the petition was heard by the Court, and John Bennett was duly adjudged a bankrupt, as a farmer, on the act of bankruptcy committed on the 1st of March, 1870. And John Evans was by the Court duly appointed trustee of the property of John Bennett, under the Bankruptcy Act, 1869.

On the day before the adjudication, on the 9th of March, 1870, the sheriff sold the goods under the execution.

John Evans, as such trustee under the bankruptcy, having claimed the proceeds of the execution, which were then in the hands of the sheriff, an application was made under the Interpleader Act by the sheriff, to a judge, who ordered this case to be stated for the opinion of this Court.

The proceeds of the execution, amounting to 85*l.* 14*s.* 3*d.*, have since been paid into court, to abide the decision of the Court.

The Court are to be at liberty to draw all such inferences of fact as a jury might draw.

1871

EVANS v. HALLAM.

The question for the opinion of the Court was, whether I. M. Hallam, as executrix, is entitled to the proceeds of the execution, or any part thereof, subject to sheriff's poundage, &c., or whether John Evans, as such trustee, is entitled to the proceeds of the execution.

Arthur Wilson, for the execution creditor. The execution is protected by s. 95, subs. 3, of the Bankruptcy Act, 1869 (1), unless the execution creditor had notice of an available act of bankruptcy. There is no notice of an act of bankruptcy. The letter of the 26th of February does not amount to notice. It contains no sufficient information as to the nature of the assignment. The person reading the letter might infer that the assignment was for a valuable consideration. It might be thought that the daughter was to raise the money with which her father might pay his debts. The notice must be specific, and not leave room for conjecture. It must contain such a statement as an execution creditor can act on. If he were to stay his hand in consequence of an insufficient notice he might lose the benefit of his judgment.

C. Hutton, contrà. The notice is sufficient. It states that the bankrupt has made an assignment of all he had; it is not necessary that it should be more specific in its terms. This case resembles *Hope* v. *Meek.* (2) The notice there did not give more information than the notice in the present case. In *Edwards* v. *Gabriel* (3) the only statement as to the execution debtor having committed an act of bankruptcy was that he had filed a petition

(1) 32 & 33 Vict. c. 71, s. 95: "Subject and without prejudice to the provisions of this Act relating to the proceeds of the sale and seizure of goods of a trader, and to the provisions of this Act avoiding certain settlements, and avoiding, on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings, the following transactions, by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy . . .

"(3): Any execution or attachment against the goods of any bankrupt, executed in good faith by seizure and sale, before the date of the order of adjudication, if the person on whose account such execution or attachment was issued, had not at the time of the same being executed by seizure and sale, notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication."

(2) 10 Ex. 829; 25 L. J. (Ex.) 11.

(3) 6 H. & N. 701; 30 L. J. (Ex.) 245; 7 H. & N. 520; 31 L. J. (Ex.) 113.

1871

EVANS v. HALLAM.

for private arrangement with his creditors, and this was held sufficient.

Wilson was not heard in reply.

COCKBURN, C.J. This case turns entirely on the construction of s. 95, subs. 3, of the Bankruptcy Act, 1869. It is clear that there is nothing to shew that the execution creditor had any notice of a prior act of bankruptcy at the time of the seizure and sale, unless the letter of the 26th of February can be regarded as notice. The effect of that letter is plainly to give notice that there had been an assignment of all the debtor's effects; but then, inasmuch as it is not stated to have been an assignment for the benefit of creditors, and it refers in terms to an arrangement according to which the daughter was to find the money, it is quite as consistent with probability that the daughter was to take an assignment of all the effects and give value for the same, as that it was an assignment for the benefit of creditors; and the first is the construction which a person receiving this letter would reasonably put upon it. And such a transaction is not an act of bankruptcy. The statute protects the execution creditor, unless he has notice of an act of bankruptcy. It is not notice of an act of bankruptcy to say something to him which might possibly put him to further inquiry; it is not notice to tell him something which, if he were to inquire further, would shew him that an act of bankruptcy did exist. Here there was no such notice as would withhold from the execution creditor the protection afforded by s. 95. This objection is fatal to the claim of the assignee, and our judgment must, therefore, be for the execution creditor.

BLACKBURN, J. I am of the same opinion. As soon as we ascertain the facts the case is plain. Here was an execution upon goods executed by seizure and sale. Then s. 95 says that such an execution shall be protected "if the person on whose account such execution was issued had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication." In point of fact, at the time the goods were seized, the bankrupt had committed an act of bankruptcy under the Bankruptcy Act, 1869,

s. 6, subs. 1, for he had made an assignment of his property to a trustee for the benefit of his creditors generally. This transaction would have been available against the bankrupt for adjudication by any creditor who had not been a party to it; and the question is, whether there had been notice of that act of bankruptcy before the sale of these goods. But there was no notice at any time of there having been an assignment for the benefit of creditors. The matter to be ascertained in these cases is, whether sufficient information was given of those facts which amount to an act of bankruptcy, so as to make it reasonable for the execution creditor to hesitate in enforcing his judgment. In this case an assignment was made, but the information as to its nature was too vague to make it incumbent upon the judgment creditor to stay the execution. Therefore the present execution is protected under s. 95, subs. 3.

MELLOR, J., concurred.

LUSH, J. I also am of the same opinion. I agree that the letter of the 26th of February does not convey information of an act of bankruptcy. The notice required by the statute must be notice of an act of bankruptcy committed by the bankrupt, and available against him for adjudication. A stranger reading the letter would not, I think, be at all under the impression that the debtor had made an assignment for the benefit of all his creditors, but would think that he had made an assignment to his daughter in order to raise money to pay his creditors.

Judgment for the execution creditor.

Attorneys for plaintiff: *Chester & Urquhart.*
Attorney for defendant: *Rutter.*

1871
June 7.

BEADON, Appellant; PARROTT, Respondent.

Workshop Regulation Act (30 & 31 *Vict. c.* 146), *ss.* 4, 6—"*Handicraft*," "*Workshop*"—*Employment of Child under Eight Years.*

A child under eight years of age was sent to the respondent to be taught to make straw plait and to read: the child was kept in a room making straw plait under the respondent's superintendence. The straw was provided by the child's mother, and the plait was taken home to her, and she sold it. She paid the respondent 3*d.* a week, but he had no interest in the proceeds of the sale of the work:—

Held, that the respondent had committed the offence of employing a child under eight years of age, within the meaning of ss. 6 and 7 of 30 & 31 Vict. c. 146, as read by the aid of the interpretation clause, s. 4.

Case stated by Justices of Bedfordshire under 20 & 21 Vict. c. 43.

The respondent was charged by the appellant, who is the sub-inspector of factories, under the Workshop Regulation Act, 1867 (30 & 31 Vict. c. 146) (1), for that he, being the occupier of a certain workshop, did employ in the workshop a child under the age of eight years.

It was proved that the respondent was a straw plaiter, and that the appellant found the child, with several others, in the respondent's house, making straw plait under his superintendence. The

(1) 30 & 31 Vict. c. 146, s. 4: "The following words and expressions shall, in this Act, have the meanings hereby assigned to them, unless there is something in the context inconsistent with such meanings; that is to say . . . 'parent' shall mean parent, guardian, or person having the custody of or control over any such child or young person; 'employed' shall mean occupied in any handicraft, whether for wages or not, under a master or under a parent, as herein defined; 'handicraft' shall mean any manual labour exercised by way of trade or for purposes of gain in or incidental to the making any article or part of an article, or in or incidental to the altering, repairing, ornamenting, finishing, or otherwise adapting for sale any article; 'workshop' shall mean any room or place whatever, whether in the open air or under cover, in which any handicraft is carried on by any child, young person, or woman, and to which and over which the person by whom such child, young person, or woman is employed has the right of access and control."

Sect. 6, sub. s. 1: "No child under the age of eight years shall be employed in any handicraft."

Sect. 7: "If any child is employed in contravention of this Act, . . . the occupier of the workshop in which such child . . . . is employed shall be liable to a penalty."

straw was provided by the child's mother, and the plait was taken home to her, and she sold it. She paid the respondent 3*d.* a week for teaching the child to make straw plait and to read, and for house-room. The respondent had no interest in the proceeds of the work.

The justices were of opinion that the making of straw plait was a handicraft within the meaning of the Workshop Regulation Act, 1867, and that the reading was taught to a very limited amount; but they were divided in opinion as to the respondent's room being a workshop within s. 4, inasmuch as the work done therein was for the sole benefit of the parent, who was, therefore, the employer of the child, but had not the right of access and control over the premises; and on this ground they dismissed the charge.

Archibald, for the appellant. The summons ought not to have been dismissed. The respondent's room was a workshop within s. 4. It is found as a fact that straw plaiting is a handicraft, and was carried on there, and the respondent, by whom the child was employed, had the control over the room. By the same section "employed" is interpreted to mean occupied in any handicraft, whether for wages or not, under a master or under a parent, as therein defined; and "parent" is defined to be the person having the custody of or control over a child. All the circumstances exist necessary to constitute an offence against s. 6, subs. 1, which provides that no child under the age of eight years shall be employed in any handicraft, and the respondent is liable as the occupier of the workshop in which the child is employed. The child was employed—that is, occupied—in a handicraft, under a master, or at all events under a parent—that is, a person having the custody of and control over her; and the child is employed in a workshop, that is, in a room in which a handicraft is carried on by her, and to which the person by whom she is employed, that is, the respondent, has the right of access; and the respondent is the occupier of the workshop. The case is clearly within the definitions given by the Act.

The respondent did not appear.

PER CURIAM (Cockburn, C.J., Mellor and Lush, JJ). The case

1871

BEADON v. PARROTT.

comes within ss. 4 and 6. The object of the Act was to prevent children under the age of eight years working under any pretence. The case will be remitted to the justices with this intimation of our opinion.

Case remitted accordingly.

Attorneys for appellant: *Solicitors to the Treasury.*

June 14.

[IN THE EXCHEQUER CHAMBER.]

SHARMAN *v.* BRANDT AND ANOTHER.

Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 17—*Signature by Agent—Parties to Contract—Broker—Undisclosed Principal.*

One of the parties to a contract cannot sign the name of the other as his agent, so as to bind him within s. 17 of the Statute of Frauds; the signature as agent must be by a third person.

A broker, signing a contract-note as selling as broker for undisclosed principals, cannot sue as principal in the contract.

The plaintiff, a broker, carrying on business as "W. S. & Co.," was authorized by the defendants, Messrs. B. & H., to buy for them in the market 200 tons of hemp. He drew up and forwarded to the defendants a contract-note: "Bought for Messrs. B. & H. of our principals 200 tons of hemp," (signed) "W. S. & Co., Brokers." The plaintiff had, in fact, no principals as sellers in the transaction; but the defendants had no notice of this. The defendants having refused to accept hemp under the contract:—

Held, that the plaintiff could not maintain an action on the contract, on the grounds, that the contract in writing was with an undisclosed principal as seller, and not with the plaintiff himself as seller; and also, that the plaintiff, if a party to the contract, could not sign as agent for the defendants, so as to bind them within s. 17 of the Statute of Frauds.

APPEAL by the plaintiff against a decision of the Court of Queen's Bench, refusing a rule to set aside a nonsuit and enter a verdict for the plaintiff.

The action was brought to recover damages from the defendants for not accepting certain hemp, according to an agreement alleged to have been entered into by them with the plaintiff. The defendants pleaded that it was not agreed as alleged.

At the trial at the sittings in London after Hilary Term, 1870, before Blackburn, J., it appeared that the plaintiff was a Russia broker carrying on business in London, without a partner, under

the firm of W. W. Simpson & Co.; and the defendants were merchants carrying on business in London under the firm of Brandt and Horny. On the 9th of January, 1869, the defendant Brandt verbally authorized the plaintiff to buy for him in the market 200 tons of clean hemp at 37*l.* a ton, for delivery from August to October; and the plaintiff, on the same day, drew up and forwarded to the defendants a contract-note in the following form:— "London, 9th January, 1869. Bought for Messrs. Brandt and Horny, of our principals, 200 tons of sound and merchantable St. Petersburg hemp, of fair average quality, at 37*l.* per ton, &c." The note was signed by the plaintiff, "W. W. Simpson & Co., Brokers."

The plaintiff had, in fact, no principal as seller in the transaction, and charged no commission. It is usual for the broker to be paid his commission by the seller.

The contract-note was received and retained by the defendants, who made no objection to it; but afterwards disputes arose as to the quality of the hemp offered by the plaintiff, and the defendants refused to accept it.

The jury, in answer to a question put to them by the learned judge, found that it was not clearly made out that the plaintiff gave the defendants notice that he had no principal as seller in the transaction.

The learned judge directed a nonsuit, holding that the contract-note signed by the plaintiff was not a sufficient memorandum to satisfy the requirements of the Statute of Frauds (1) so as to bind the defendants; and he reserved leave to the plaintiff to move to set aside the nonsuit and to enter the verdict for him, if the Court of Queen's Bench should be of opinion that the contract-note constituted a sufficient memorandum within the meaning of the statute; the damages to be calculated as then agreed between the parties, and the defendants to be at liberty to contend that

(1) 29 Car. 2, c. 3, s. 17: "That no contract for the sale of any goods, wares, and merchandises, for the price of 10*l.* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

1871

SHARMAN v. BRANDT.

it was not competent to the plaintiff, who appeared on the face of the contract to be the broker, to come forward and sue as principal.

On the 22nd of April, 1870, a motion was made in the Court of Queen's Bench, on behalf of the plaintiff, for a rule nisi, in accordance with the leave reserved; but the Court refused the rule, on the ground that, according to decided cases, the signature was not sufficient within the statute.

J. Brown, Q.C. (*Archibald* with him), for the plaintiff. The rule was refused in the Court of Queen's Bench on the authority of *Wright* v. *Dannah* (1), in which Lord Ellenborough said, that one of the contracting parties could not sign the name of the other as agent, but that the agent must be some third person, which dictum was affirmed by the Court in *Farebrother* v. *Simmons.* (2) In Blackburn on Sale, p. 77, it is pointed out that doubts had been expressed as to the propriety of this decision in *Bird* v. *Bolter* (3). The defendants must be taken to have agreed that the plaintiff should sign on their behalf, and if so, they cannot afterwards set up the objection, that the person signing is the other party to the contract: *Matthew* v. *Ollerton.* (4) Secondly, it will be said that the plaintiff cannot sue, having contracted as broker; and no doubt *Fairlie* v. *Fenton* (5) seems at first sight to be in point; but it does not appear, in that case, that there were, in fact, no principals in the matter.

Sir G. Honyman, Q.C. (*Watkin Williams* with him), for the defendants, was not heard.

KELLY, C.B. The question is settled by the authority of the cases cited; but without any authority, on first principles, a contract between a broker, though in his own person, but expressed to be as broker for an unnamed principal, and a purchaser, is not a contract made between the broker as unnamed principal and the purchaser; this was therefore not a note of any contract at all between the plaintiff, as seller, and the defendants, as purchasers.

(1) 2 Camp. 203.
(2) 5 B. & Ald. 333.
(3) 4 B. & Ad. 443.
(4) 4 Mod. 226.
(5) Law Rep. 5 Ex. 169.

Nor was the memorandum signed in such a way as to be enforceable within the Statute of Frauds.

MARTIN, B. I am of the same opinion. I very much doubt whether there was any contract at all. If a man employ another as broker to go into the market and purchase goods for him at a certain price, the other could not, under such authority, make himself a principal in the contract of sale and purchase. The note does not describe the true contract as to parties, which it must do; for it describes a contract between the broker on behalf of unnamed principals as sellers, and the defendants as purchasers: whereas, in reality, the plaintiff now says, the contract was between the broker as principal and the defendants. I am also clearly of opinion, that the note was not a memorandum signed as required by the statute; one of the parties cannot be the agent of the other for the purpose of signing the contract.

CHANNELL, B. I concur in affirming the judgment; and I base my decision solely on the ground that the note is not sufficiently signed within the statute.

BYLES, J. It is sufficient in order to affirm the judgment that there have been two cases decided on the point, and acquiesced in for years.

PIGOTT and CLEASBY, BB., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Hill & Son.*
Attorneys for defendants: *Thomas & Hollams.*

1871
June 15.

SELMES *v.* JUDGE AND ANOTHER.

Notice of Action—Surveyor of Highways—5 & 6 Wm. 4, c. 50, s. 109—Action to recover back Money paid on Illegal Rate.

The defendants, surveyors of highways, appointed under 5 & 6 Wm. 4, c. 50, received payment from the plaintiff of an assessment upon a highway rate which was neither signed, allowed, nor published according to s. 27 of that Act, but which appeared to have been made under an earlier repealed Act. In making the rate and receiving payment, the defendants intended to act in the performance of the duties of their office. In an action brought to recover back the money paid:—

Held, that the defendants were entitled to notice of action, pursuant to 5 & 6 Wm. 4, c. 50, s. 109.

APPEAL from the County Court of Sussex, holden at Rye.

The action was brought to recover 14*l.* 6*s.* for money illegally demanded of the plaintiff by the defendants, and paid by him, for a highway rate pretended to be made on the 1st of December, 1868, at 1*s.* in the pound.

At the hearing it was proved that, at the general annual vestry-meeting, holden on the 2nd of April, 1868, the defendants were appointed surveyors of the highways of such part of the parish as lies within the borough of Rye for the year ensuing; and that James Duberly was appointed collector of the highway rate for the year ensuing.

On the 10th of December following, the defendants made a rate for the use of the highways, which was entered in the rate-book in the following terms:—"Rye. The 10th day of December, 1868. A composition of one shilling in the pound is agreed to be taken by Joseph Judge and James Collins Hoad, surveyors of the highways within the town and liberty of Rye, in lieu of statute work to be performed and done by the several inhabitants and occupiers of land, hereditaments, &c. Due notice of composition being first given as by Act of Parliament in that behalf provided."

The rate was not signed by the defendants as surveyors, nor allowed by two justices of the peace, nor published in accordance with s. 27 of 5 & 6 Wm. 4, c. 50.

1871

SELMES v. JUDGE.

The rate-book was in due course given to the collector to collect the rate.

Upon the 13th of January, 1869, the plaintiff being ignorant of the facts, was applied to for payment of the rate. It was on a Rye cattle market day, while the plaintiff was in the market. The collector asked for the rate in the usual manner, and the plaintiff paid it without comment, and received from the collector a receipt.

The plaintiff contended that he was entitled to recover back the money as money paid under mistake of fact, on the ground that the rate was illegal on several grounds, but the following was the only one material:—That the rate was evidently intended to have been made under 13 Geo. 3, c. 78, which provided for such a composition as the rate purported to be, and which statute had been repealed by 5 & 6 Wm. 4, c. 50.

The defendants contended:—1st. That the defendants having been sued as surveyors of the highways, were entitled to notice of action under 5 & 6 Wm. 4, c. 50, s. 109. (1) 2nd. That more than three calendar months having expired since the fact was committed for which this action was brought, such action could not lie.

The judge, who tried the cause without a jury, held that the plaintiff was entitled to recover, and gave judgment for plaintiff for 14*l.* 6*s.* and costs on the following, amongst other grounds:—1st. That the rate was void, it having been erroneously made as a composition in lieu of statute work under the repealed Act of 13 Geo. 3, c. 78; and, further, that the rate was not signed by the defendants as surveyors, nor allowed by two justices of the peace, nor published as required by 5 & 6 Wm. 4, c. 50, s. 27. 3rd. That the defendants were not entitled to notice of action, inasmuch as the Act of 13 Geo. 3, c. 78, under which the rate had been illegally made, did not require any notice of action.

The question for the opinion of the Court was, Whether the ruling of the judge was correct in point of law.

(1) 5 & 6 Wm. 4, c. 50, s. 109:—"No action or suit shall be commenced against any person for anything done in pursuance of, or under the authority of this Act, until twenty-one days' notice has been given thereof in writing to the justice, surveyor, or person against whom such action is intended to be brought, . . . nor after three calendar months next after the fact committed for which such action or suit shall be so brought. . . ."

1871

SELMES v. JUDGE.

Hance, for the defendants. If the defendants are entitled to notice of action, the decision on that point will render it unnecessary to consider the other questions. (1) It is submitted that they are entitled to notice of action under s. 109 of 5 & 6 Wm. 4, c. 50. The rule, as laid down in *Hermann* v. *Seneschal* (2) and *Roberts* v. *Orchard* (3), is, that if the defendants honestly believe in the existence of those facts which, if they had existed, would have afforded a justification, they are entitled to notice of action. In this case the defendants were surveyors, and they honestly believed that they were empowered by statute to make and collect the rate; they are, therefore, protected by the statute. *Greenway* v. *Hurd* (4) and *Waterhouse* v. *Keen* (5) are strong authorities for the defendants.

Lanyon, for the plaintiff. It must be admitted that the defendants intended to act as surveyors of highways, but their proceedings in making the rate were not intended to be taken under the 5 & 6 Wm. 4, c. 50, but under a repealed Act; they, therefore, cannot claim the protection of the more recent Act, and *Downing* v. *Capel* (6) shews it to be necessary that a defendant should believe himself to be acting within the provisions of an existing Act. According to Bramwell, B., in *Hardwick* v. *Moss* (7), the defendants ought to have had reasonable grounds for believing that they were acting under the authority of the Act. It is clear that the defendants, who acted under the supposed authority of a repealed Act, had no reasonable ground for compelling the payment of the assessment by the plaintiff; and from *Leete* v. *Hart* (8) it may be inferred that even an honest belief would be insufficient, unless the defendants had reasonable grounds for their belief. *Cook* v. *Leonard* (9), and the judgment of Lord Denman, C.J., in *Smith* v. *Hopper* (10), are to the same effect. In *Poulsum* v. *Thirst* (11), the acts occasioning injury to the plaintiff were done under the

(1) The other points were that the rate was bad, not having been either signed, allowed, or published, and also that the money having been paid voluntarily could not be recovered back.

(2) 13 C. B. (N.S.) 392; 32 L. J. (C.P.) 43.

(3) 2 H. & C. 769; 33 L. J. (Ex.) 65.

(4) 4 T. R. 553.

(5) 4 B. & C. 200.

(6) Law Rep. 2 C. P. 461.

(7) 7 H. & N. 136; 31 L. J. (Ex.) 207.

(8) Law Rep. 3 C. P. 322.

(9) 6 B. & C. 351.

(10) 9 Q. B. 1005; 16 L. J. (Q.B.) 93.

(11) Law Rep. 2 C. P. 449.

provisions of the Act which entitled the defendants to a notice of action.

1871

SELMES v. JUDGE.

Hance replied.

BLACKBURN, J. The defendants were entitled to the notice of action required by 5 & 6 Wm. 4, c. 50, s. 109, on the ground that they were intending to act under the provisions of that Act when they made this rate, and obtained payment of it from the plaintiff. It has long been decided that such a provision as that contained in this section is intended to protect persons from the consequences of committing illegal acts, which are intended to be done under the authority of an Act of Parliament, but which, by some mistake, are not justified by its terms, and cannot be defended by its provisions. Here the defendants were surveyors of highways, elected under 5 & 6 Wm. 4, c. 50. It is probable that they did not know what was the Act under which they were appointed; but assuredly they intended that everything which they did as surveyors of highways should be done under the authority of the statute under which they were appointed. The county court judge has found that the rate was informal in many particulars, and in truth on the face of it it was called a composition. In all probability the defendants had taken some old form, drawn up under the 13 Geo. 3, c. 78, since repealed. The judge thought that the defendants were not acting under the 5 & 6 Wm. 4, c. 50, and that consequently they were not entitled to the notice of action allowed thereby. I agree that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute. In this case nothing is stated shewing that the defendants, when they made the rate in question, knew that it was not allowed by the statute under which they were appointed, and it has not been found that the defendants were trying, under the colour of the law, to get money to which they had no right, in which case they would not have been protected by the Act. The only illegal act done by the defendants was to make an informal rate; they proceeded to collect it, and received from the plaintiff the amount assessed upon him; in these transactions it is clear that the

1871

SELMES v. JUDGE.

defendants intended to act according to the duties of their office as surveyors, although they mistook the legal mode of carrying out their intention. Neither in *Hermann* v. *Seneschal* (1), nor in *Roberts* v. *Orchard* (2), was it decided that a defendant would not be entitled to notice of action, because he had been mistaken in the law. In *Hardwick* v. *Moss* (3) surveyors had obstructed a highway without any statutory authority, but the Court of Exchequer held that as they intended to act pursuant to the Highway Act, they were entitled to notice of action. In *Wordsworth* v. *Harley* (4) the question arose upon a former Highway Act; a very high-handed course had apparently been pursued by the defendant, a surveyor of highways, who took a portion of the plaintiff's field and added it to a public road without the plaintiff's consent: Lord Tenterden, C.J., with the concurrence of the rest of the Court, held that the defendant was entitled to the protection of the Highway Act, although he considered the case to be very unfortunate for the plaintiff. It was assumed in that case that if in repairing highways the surveyor illegally and improperly took a portion of land, he was acting in pursuance of the statute, and might shelter himself under its provisions. In the present case it was the duty of the defendants to collect highway rates, and they intended to act in pursuance of the statute; they were therefore entitled to notice of action.

LUSH, J. I agree with my Brother Blackburn. I cannot read the judgment of the county court judge as finding that in point of fact the defendants did intend to act without authority, or that they acted wantonly and in abuse of their power; but I understand him to express an opinion that in point of law, inasmuch as the rate appeared to have been made under 13 Geo. 3, c. 78, and that Act was repealed, the defendants could not be admitted to allege that they had acted under the 5 & 6 Wm. 4, c. 50. I think this an erroneous view. The question was, whether the defendants in making the rate intended to do what they were authorized to do. It is clear that they bonâ fide believed they were doing what the

(1) 13 C. B. (N.S.) 392; 32 L. J. (C.P.) 43.
(2) 2 H. & C. 769; 33 L. J. (Ex.) 65.
(3) 7 H. & N. 136; 31 L. J. (Ex.) 207.
(4) 1 B. & Ad. 391.

law allowed, and that is all that is needed to entitle them to the protection of the statute.

1871

SELMES v. JUDGE.

HANNEN, J. I am of the same opinion. The question is, did the defendants bonâ fide intend to make a rate as surveyors of highways? If they did, they were entitled to notice of action.

Judgment for the defendants.

Attorneys for plaintiff: *Burton, Yeates, & Hart.*
Attorneys for defendants: *Kingsford & Dorman.*

SMITH AND OTHERS *v.* BROWN AND OTHERS.

July 6.

Prohibition—Jurisdiction of Court of Admiralty to entertain a Suit under 9 & 10 *Vict. c.* 93*—Injury and Death caused by Collision at Sea—*24 *Vict. c.* 10, *s.* 7 *—"Damage done by any Ship."*

24 Vict. c. 10, s. 7, enacts "that the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

Held, by Cockburn, C.J., and Hannen, J. (Blackburn, J., doubting), that personal injury occasioned by the collision of two vessels, does not come under the term "damage" as used in the above section: and that the Court of Admiralty has no jurisdiction to entertain a suit, instituted under 9 & 10 Vict. c. 93, for personal injuries resulting in death occasioned by the collision of two vessels.

The Beta (Law Rep. 2 P. C. 447) dissented from.

DECLARATION in prohibition, that the plaintiffs were the owners of a steam vessel called the *Black Swan*, and the steam vessel came into collision on the high seas with a screw steam vessel called the *St. Bede*, and by reason of the collision the *St. Bede* sank and her master and several of the crew were drowned, and the defendants (thereinafter called the plaintiffs in the suit) were, respectively, the wives, parents, and children of the master of the *St. Bede* and of those of the crew of the *St. Bede* who were drowned in the collision, and had instituted in the High Court of Admiralty of England a suit against the steam vessel *Black Swan* (thereinafter called the suit), to recover damages for the injury resulting to the plaintiffs in the suit respectively, from the death of the master and the death of those of the crew of the *St. Bede* who were drowned. The declaration then set out the præcipe to institute the suit, and averred

1871

SMITH v. BROWN.

that the plaintiffs in the prohibition were, in order to prevent the arrest of their steam vessel *Black Swan*, compelled to enter an appearance in the suit, and to give bail in the suit for the sum of 5000*l.*, and it also set out the petition of the plaintiffs in the suit, and stated that the plaintiffs in the prohibition prayed Sir R. J. Phillimore, the judge of the Court of Admiralty, to reject the petition, because the cognizance of the same appertained not to the Court of Admiralty; yet the judge refused to reject the petition, and ordered the plaintiffs in the prohibition to answer the same. The declaration then alleged that the plaintiffs in the suit were not on board the steam vessel *St. Bede* at the time of the collision, and that the plaintiffs in the suit had not any share or interest in the steam vessel *St. Bede*, or in any goods or chattels laden on board thereof, or belonging thereto, and that the plaintiffs in the suit had not sustained any loss, damage, or injury by reason of any act, neglect, or default of the plaintiffs in the prohibition or their servants, other than the injury resulting to the plaintiffs in the suit respectively from the death of the master and from the death of those of the crew who were drowned; that no proceedings had been instituted or entertained in the High Court of Admiralty at the suit of the plaintiffs in the prohibition for the purpose of determining the amount of the liability incurred by them in respect of loss of life, personal injury, or loss of or damage to ship's boats, or goods, or for the distribution of such amount; and that the cognizance of the suit belonged not to the Court of Admiralty, and that the Court of Admiralty had no power or authority to entertain the prayer of the plaintiffs in the suit or to refer it to the registrar of the court assisted by merchants to ascertain the amount of the damage claimed by the plaintiffs in the suit, nor had the registrar of the court, assisted by merchants, power to ascertain the amount of such damage, yet the plaintiffs in the suit did prosecute the suit in the Court of Admiralty. Wherefore the plaintiffs in the prohibition prayed remedy by writ of prohibition to the judge of the Court of Admiralty to be directed.

Demurrer and joinder in demurrer.

May 2 and 30. *Butt, Q.C.* (*Clarkson* with him), in support of the demurrer.

1871

SMITH v. BROWN.

Manisty Q.C. (*G. Bruce* with him), contra.

The arguments sufficiently appear in the judgments of the Court. All the statutes mentioned are fully commented on in the judgment delivered by Cockburn, C.J.

In addition to the cases noticed in the judgments, the following cases were cited: *The Amalia* (1); *Hill* v. *Audus* (2); *The Bilbao* (3); *The Ida* (4); *Ramsay* v. *Allegre* (5); *Thorogood* v. *Bryan* (6); *Cattlin* v. *Hills.* (7)

Cur. adv. vult.

July 6. The judgment of COCKBURN, C.J., and HANNEN, J., was delivered by

COCKBURN, C.J. This was a demurrer to a declaration in prohibition upon an application made to this Court to prohibit a suit in the Court of Admiralty, instituted by the defendants as widows or surviving relatives of certain persons who were drowned by the sinking of a vessel called the *St. Bede,* which was run down in a collision with the vessel of the present plaintiffs, called the *Black Swan,* occasioned, as was alleged, by the negligence of the persons having charge of the latter vessel. The plaintiffs, defendants in the suit in the Court of Admiralty, excepted to the jurisdiction of that Court to entertain the suit, but their plea was overruled; whereupon they applied to this Court for a prohibition; and the question which presents itself for our decision on the present record is, whether the Court of Admiralty has jurisdiction to entertain such a suit or not. The question is one of considerable difficulty; but my Brother Hannen and I are, on the whole, of opinion that the Court of Admiralty does not possess the jurisdiction contended for.

The question turns entirely on the effect of s. 7 of 24 Vict. c. 10. Whatever may have been the pretensions of the Court of Admiralty in ancient times to jurisdiction in the matter of personal injuries arising on the high seas—as explained by Mr. Justice Story in the case of *De Lovio* v. *Boit* (8), and referred to by Sir Robert Phillimore

(1) 1 Moo. P. C. (N.S.) 471.
(2) 1 K. & J. 263; 24 L. J. (Ch.) 229.
(3) Lush. 149.
(4) Lush. 6.
(5) 7 Curtis, 401; 12 Wheaton, 611.
(6) 8 C. B. 115; 18 L. J. (C.P.) 336.
(7) 8 C. B. 123.
(8) 2 Gallison, 398.

1871

SMITH v. BROWN.

more in the case of *The Sylph* (1)—it is admitted that, as regards personal injuries caused by collision, no such jurisdiction, independently of recent statutes, has existed in modern times, and it is too plain to admit of doubt that the right of action created for the first time by the 9 & 10 Vict. c. 93, and 27 & 28 Vict. c. 95, s. 2, was by these Acts confined to actions brought in the Courts of Common Law. It is not contended that jurisdiction was conferred by these Acts on the Court of Admiralty. The jurisdiction, if it exists at all, must have been created by the recent legislation for the extension of the Admiralty jurisdiction.

The 7th section of 24 Vict. c. 10, on which the present question depends, is in these few words: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship;" the term "ship" being, by the interpretation clause, s. 2, to be taken to "include any description of vessel used in navigation, not propelled by oars." The question is whether loss of life or personal injury occasioned by the collision of two vessels comes under the term "damage," as used in this section.

Now, the words used are, undoubtedly, very extensive; but it is to be observed that neither in common parlance nor in legal phraseology is the word "damage" used as applicable to injuries done to the person, but solely as applicable to mischief done to property. Still less is this term applicable to loss of life, or injury resulting therefrom to a widow or surviving relative. We speak, indeed, of damages as compensation for injury done to the person; but the term "damage" is not employed interchangeably with the term "injury," with reference to mischief wrongfully occasioned to the person. And that this distinction is not a matter of mere verbal criticism, but is of a substantial character and necessary to be attended to, is apparent from the fact that the legislature in two recent Acts in pari materiâ, both having reference to the liability of shipowners in respect of injury or damage, namely, the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, part ix.), and the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63, s. 54), has in a series of sections carefully observed this distinctive phraseology, speaking in distinct terms in the same section of loss of life and personal injury on the one hand, and loss and

(1) Law Rep. 2 A. & E. at p. 26.

damage done to ships, goods, or other property on the other. In those Acts the term "damage" is nowhere used as applicable to injuries done to the person; it is applied only to property and inanimate things. We see no reason to suppose that the legislature in using the term in the enactment we are considering had lost sight of the distinction uniformly observed in the preceding statutes.

No doubt, if there were anything in the other provisions of the Act which shewed that the term "damage" had been employed in a more comprehensive sense, we ought not to restrict the operation of the enactment by too nice a regard to the language used. But we not only find nothing in the other provisions of the statute which can have this effect, but, when we consider what will be the consequences of bringing suits instituted under Lord Campbell's Act (9 & 10 Vict. c. 93) within the jurisdiction of the Admiralty, it seems to us impossible to suppose that the legislature can have intended, under a general enactment like the present, as it were by a side-wind, to effect so material a change in the rights and relative positions of the parties concerned in such an action.

The purpose and effect of the 9 & 10 Vict. c. 93 was to give to the parties, who acquired a right of action under it, a right to full compensation, to be recovered by the procedure of the ordinary law of the land. But the consequence of a transfer of the jurisdiction of the Courts of Common Law to the Court of Admiralty would be, not only to deprive the parties of the common law procedure and mode of trial, but (what is of still greater importance) materially to alter their substantive rights and relative position, inasmuch as a court of admiralty in dealing with claims for damage arising from collision—as, for instance, in holding that, where both vessels were in the wrong, the loss is to be divided between them—acts upon principles unknown to the common law, and which, though they may be very proper in the case of damage done by one vessel to another, are altogether inapplicable to the case of personal injury, or the right to compensation given by the 9 & 10 Vict. c. 93. We cannot think that the legislature would have introduced so important a change without an enactment referring in express terms to the case of loss of life or personal injury, as was done in the Merchant Shipping Acts already referred to. It is true that in

1871

SMITH v. BROWN.

these Acts the legislature had interfered with and abridged the rights of parties having a right of action under Lord Campbell's Act, by limiting the liability of the shipowner in case of collision to the value of the ship and freight, and enabling the latter to apply to the Court of Chancery for protection against any demand beyond it. But in doing so, the legislature has given jurisdiction in reference to loss of life or personal injury in express terms, and has not contented itself with the general term "damage," confining the use of the latter to injury to ships and property, as distinguished from persons. We cannot but think that what the legislature has thus done with reference to what may be called the protective jurisdiction of the Court of Chancery, created by 17 & 18 Vict. c. 104, part ix., and the general limitation of the shipowner's liability established by the later statute of the 25 & 26 Vict. c. 63, it would have done in the present instance, had it intended to confer on the Court of Admiralty the initiative jurisdiction to entertain a suit instituted under the 9 & 10 Vict. c. 93, by the parties entitled to sue under that Act.

It may be said that if the enactment of s. 7 of 24 Vict. c. 10 is to be confined to damage done to property in cases of collision, the enactment becomes useless, seeing that the Court of Admiralty had undoubted jurisdiction in such cases before. But if what was said Dr. Lushington in the case of *The Malvina* (1) be looked at, it will be seen that, even with reference to the jurisdiction of the Admiralty in respect of damage to property, the section is by no means without its value. By the statute of 13 Rich. 2, c. 5, the jurisdiction of the Admiral was expressly limited to cases arising on the high seas. It was, therefore, ousted in respect of any damage occurring on any water within the body of a county. By the Act of 3 & 4 Vict. c. 65, this restriction was, indeed, removed, jurisdiction being given in respect of "all claims and demands whatsoever in the nature of damage received by any ship or sea-going vessel," "whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the damage was received in respect of which such claim is made." But the jurisdiction thus given was confined to ships and sea-going vessels; damage done to a barge or other vessel used for

(1) Lush. 493.

inland navigation would not have been within the jurisdiction. Hence Dr. Lushington says, that from the use of these words "constant confusion had arisen." When, therefore, an Act was passed for the express purpose of placing the jurisdiction of the Court of Admiralty on a broader and firmer basis—of making it, what it had not before been, a Court of Record, and giving it many of the powers in respect of procedure previously confined to the Courts of Common Law—it is not to be wondered at that a provision should have been introduced for getting rid of the difficulty created by the limitation of the jurisdiction to any ship or seagoing vessel, by including within it damage done by any description of vessel used in navigation not propelled by oars. Under this enactment Dr. Lushington, in the case referred to, was enabled to hold that damage done by a ship to a barge in the river Thames was within the jurisdiction of the Admiralty.

However large the words of s. 7 may be, it is plain that the opinion of Dr. Lushington was, that while they removed the difficulties arising from the statute of Richard II. and the language of the 3 & 4 Vict. c. 65, they could not operate to enlarge the jurisdiction of the Court in respect of matters which were not within it before. In the case of the *The Robert Pow* (1) he says: "As in the former statute, 'damage' here means, damage done by collision;" and on this ground he refused to entertain a claim for damage occasioned to a vessel by negligence in towing.

It is true that, in the case of *The Uhla* (2), Dr. Lushington held that where a ship had driven against a breakwater, and had done damage to it, a suit in the Admiralty Court would lie; but there the damage had been actually done to the breakwater by the ship itself, and the case, therefore, came within the very words of the Act; nor was there the difficulty we have pointed out in the application of the term "damage" to personal injury. If, then, the opinion thus expressed by the eminent authority referred to—namely, that the effect of the enactment in question is not to extend the jurisdiction to a new subject-matter which was not within it before—was, as we think it was, the correct view, it would appear to follow that, inasmuch as, prior to the statute, the jurisdiction of the Court of Admiralty in the case of collision did not extend to loss of life or personal injury, no enlargement of the

(1) Bro. & Lush. at p. 102. (2) Law Rep. 2 A. & E. 29, n.

1871

SMITH v. BROWN.

jurisdiction to claims thus arising can be held to have been created. And this is the conclusion at which, though not without doubt and difficulty, my Brother Hannen and I have arrived.

We are aware that, in holding that the Court of Admiralty has not acquired jurisdiction in cases within the 9 & 10 Vict. c. 93, we are taking upon ourselves to overrule cases decided by very high authority. In the case of *The Sylph* (1) the present judge of the Admiralty Court held, that a diver, who had been caught by the paddle-wheel of a steamer, and had suffered personal injury, might maintain a suit in that court. In the subsequent case of *The Guldfaxe* (2) the same learned judge held—though, as he himself declared, "not without doubt and hesitation"—that a claim arising on Lord Campbell's Act was within the jurisdiction of the Court. In the still later case of *The Beta* (3), the plaintiff having brought his suit in the Court of Admiralty, in respect of personal injuries sustained through a collision between a ship on board of which he was serving and the defendants' vessel, the defendants excepted to the jurisdiction; and the judge having rejected their petition, and the case having been brought before the Judicial Committee of the Privy Council, on appeal, that Court, without even calling on the counsel for the respondents, dismissed the appeal with costs. We have, of course, felt greatly pressed by the weight of the decision of a Court of such high authority; but we have been unable to bring ourselves to adopt the same view. The grounds of the decision, which appear to us to have been arrived at somewhat hastily, are very briefly given in the report of the case; and the difficulties which have stood in our way in taking the same view of the effect of the 7th section, and which have led us to an opposite conclusion, do not appear to have been present to the minds of the members of the Committee who took part in the decision. Whatever deference we should, under other circumstances, feel bound to shew to the decision of the Judicial Committee of the Privy Council, as an appellate tribunal, we must, in the exercise of our jurisdiction now invoked, only look upon it as forming a branch of the Court of Admiralty; and as, after having given the case our best consideration, we arrive at the conclusion that the legislature, in omitting all reference to loss of

2PD169

(1) Law Rep. 2 A. & E. 24. (2) Law Rep. 2 A. & E. 325.
(3) Law Rep. 2 P. C. 447.

life or personal injury, such as is to be found in the Merchant Shipping Acts, cannot properly be taken to have intended to give jurisdiction in respect of such matters by the use of the term "damage," and thereby materially to alter the rights accruing under Lord Campbell's Act, we feel bound, notwithstanding the weight of the authority we have referred to, to give effect to our opinion by giving judgment for the plaintiffs in prohibition.

BLACKBURN, J. I have entertained doubts in this case, not altogether removed, but which are not strong enough to make me dissent from this judgment, or even to make me require further time for consideration. I agree that the whole question depends upon the construction of the statute 24 Vict. c. 10; and I also agree, that in a case of prohibition where we are called upon to restrain the Court of Admiralty, we are not bound by any decisions either in the Court of Admiralty or in the Court of Privy Council when sitting in an appeal from that Court, though their reasons are to be weighed with great respect. I cannot concur in what is said by the Privy Council in the case of *The Beta* (1), namely, that "There was every reason for the legislature enacting that which the Court below holds to have been enacted." On the contrary, I feel the full force of the objections, stated in the judgment just delivered, to the legislature so enacting. I think that the legislature, if such was their intention, have been guilty of an improvident and hasty piece of legislation, more particularly in not providing for the difficulties as to the mode of assessing the damages, and not enacting whether the civil law or the common law is to be followed in cases where the injured or slaughtered man was partly to blame. I feel also strongly that it rests on the defendants in this suit to satisfy us that the legislature have affirmatively expressed an intention to confer on the Admiralty a new jurisdiction so extensive as is said. My doubt, however, has been whether the words used by the legislature were not such as to shew that the legislature have enacted in a way I think rash and careless, but still have so enacted. I do not dissent from a judgment which seems to me to have the effect of putting that meaning on the words of the legislature, which, in my opinion, they should have intended to express; but I doubt too much

(1) Law Rep. 2 P. C. 447.

1871

SMITH v. BROWN.

whether they have not expressed an intention to give this jurisdiction to permit me to concur in the judgment, though I sincerely hope that the statute may ultimately be held to have the meaning put upon it by the judgment of the majority.

Judgment for the plaintiffs.

Attorney for plaintiffs: *T. Cooper.*
Attorneys for defendants: *Hillyer & Fenwick.*

June 22.

GRIFFITHS *v.* THE LONGDON AND ELDERSFIELD DRAINAGE BOARD.

Land Drainage Act, 1861 (24 & 25 *Vict. c.* 133), *ss.* 29, 31, 38—*Preliminary Expenses of proposed Works, how defrayed—General Rate on Occupiers for Preliminary Expenses—Mode of assessing Land.*

By 24 & 25 Vict. c. 133, s. 29, previously to commencing new works, when they involve an expenditure of more than 1000*l.*, the commissioners of sewers shall cause plans of the proposed works and an estimate of the expense thereof to be made, and shall publish their intention to execute such works two months before commencing the same. By s. 31, if within such period of two months the proprietors of one-half of the area of the land to be rated declare their dissent, the commissioners shall take no further steps; but if no such declaration is made the commissioners may commence the work, and repay, out of the rates to be levied by them within the area, all expenses incurred. By s. 38, rates may be levied by the commissioners for defraying all costs incurred by them, and a rate levied for the purpose of defraying the expense of new works involving an expenditure of more than 1000*l.*, shall be deemed to be a special rate, and a tax on the owners of property; but other rates shall be payable by the same persons in respect of the same property as they are now by law payable. By s. 67 all powers by the Act vested in commissioners of sewers may be exercised by a drainage board.

The drainage board for a district incurred expenses in making surveys and plans for certain proposed works. The estimates for the proposed works amounted to more than 1000*l.* The proprietors of one-half of the land dissented from the execution of these works, which were never carried out. The board made a general rate on the occupiers of land in the district, in order to pay for the expenses of the surveys and plans:—

Held, that the occupiers, and not the owners, were chargeable, under ss. 31 and 38, with these expenses; and that the rate was properly made on the present value of the land.

CASE stated by consent after issue joined.

The plaintiff is a farmer living at and occupying a house and land (part of which land, namely, 1R. 30P., he is the owner)

1871

GRIFFITHS v. LONGDON DRAINAGE BOARD.

in Eldersfield, in the county of Worcester. The defendants are a drainage board, incorporated under the Land Drainage Act, 1861 (24 & 25 Vict. c. 133 (1)), for a separate drainage district comprising lands in several parishes, including the parishes of Longdon and Eldersfield.

Previous to 1863, costs, charges, and expenses were incurred by the board in and about setting out and surveying and mapping the lands to be included in their drainage district (such survey, plans, &c., were made by Swinburn); and costs, charges, and expenses were incurred by the inclosure commissioners in relation to the issue of the provisional order constituting the drainage

(1) By 24 & 25 Vict. c. 133, s. 29, previously to commencing any improvement in existing works, or any new works, where such improvements or new works involve an expenditure of more than 1000*l.*, the commissioners shall cause plans of the proposed work, and an estimate of the expense thereof, and of the area within which a rate will be required to be levied to meet such expense, to be made, together with a list of the names and addresses of the persons reputed to be proprietors of the land within such last-mentioned area, with the addition of the number of acres of which each person is reputed to be the proprietor, and shall publish their intention to execute such works two months before commencing the same . . .

By s. 31, if within such period of two months the proprietors of one-half of the area of land within which a rate is, according to the notice, proposed to be levied declare in writing to the commissioners, by notice left at their office, that they are unwilling that such work should be executed, the commissioners shall take no further steps therein; but if no such declaration of dissent is made, the commissioners may, at the expiration of such period of two months, commence the proposed work, and repay, out of the rates to be levied by them within the area, all expenses incurred not exceeding the estimate published in the notice.

By s. 38, the following regulations shall be observed with respect to rates leviable by commissioners of sewers—that is to say: First, as to the purposes of the rate. Rates may be levied by commissioners of sewers for defraying all costs, charges, and expenses incurred or to be incurred by them under the authority of any Act of Parliament, law, or custom. Secondly, as to the incidence of the rates. (1) A rate levied by the commissioners for the purpose of defraying the expense of any improvements in existing works, or any new works, where such improvements or new works involve an expenditure of more than 1000*l.*, shall be deemed to be a special rate, and shall be deemed to be a tax on the owners of property; but, except such special rate, rates leviable by the commissioners shall be payable by the same persons, in respect of the same property, and in the same manner as they are now by law payable.

By s. 67, all powers by this Act vested in or exerciseable by commissioners of sewers may, upon the constitution of a drainage district, be exercised by the drainage board. . . .

1871

GRIFFITHS v. LONGDON DRAINAGE BOARD.

board, dated the 28th of January, 1863, and obtaining the local Act confirming the same; and there were also other necessary costs, charges, and expenses incurred by the board. The total of such costs, charges, and expenses so incurred did not amount to 450*l.*

In 1863 the defendants employed one J. B. Denton to survey the lands within their district, and to prepare working maps, plans, specifications, and report, for the purpose of making works for the improvement of the existing drainage works of all the lands within their district, and for providing a general outfall for all such drainage, according to the provisions of the Acts. Denton used Swinburn's survey, and completed his own plans, specifications, and report in March, 1864, for which the defendants paid him 112*l.*; and as the plans, &c., of the improvements contemplated had then caused an expenditure of more than 1000*l.*, and the completion of the improvements contemplated in accordance with such plans, &c., would cause an expenditure of about 10,000*l.*, the defendants endeavoured to obtain the necessary assent required by the Land Drainage Act, 1861, s. 31, to the costs then incurred, and to such improvements being completed; but within the necessary time the proprietors of more than one-half of the area of the land within the district, and within which a rate was proposed to be made, declared in writing, in due form, to the defendants that they were unwilling that such works should be completed in the manner proposed by Denton; and everything happened which was necessary to happen to require that the defendants should take no further steps therein. The defendants necessarily incurred costs, charges, and expenses for and incident to the matters aforesaid amounting to 223*l.* 4*s.* 6*d.*

In the year 1867 the survey and plans prepared by Swinburn, and the plans, &c., prepared by Denton, were submitted by the defendants to one Curley, for the purpose of preparing a scheme of drainage for the district. Curley used Swinburn's survey and saw Denton's plans, but made his own plans, and prepared a different and much less expensive system of drainage works, which was duly assented to by the requisite number of landowners in the district, and such drainage works have since been executed.

In order to provide money to meet the costs, charges, and expenses, amounting to 2233*l.* 4*s.* 6*d.*, the defendants caused a valuation of the houses, buildings, and lands in the district to be made, and on such valuation made a rate upon all the occupiers of houses, buildings, and lands in the district, according to their annual value, at 9*s.* in the pound.

The plaintiff objected to pay the rate upon the ground that it should have been an acreage rate made on land alone, and on the owners not the occupiers of land.

The plaintiff attended a meeting of the defendants, on the 10th of April, 1866, and then objected to the validity of the rate, and refused to pay the same on the above grounds.

The plaintiff, still refusing to pay, was summoned by the defendants, who afterwards distrained a horse for the rate. The plaintiff thereupon replevied the horse.

The questions for the opinion of the Court are—1. Whether the rate should have been an acreage rate. 2. Whether it should have been made upon land only. 3. Whether it should have been made upon the owners and not the occupiers of land.

Lord, for the plaintiff. The rate is bad. The lands ought to be rated according to their acreage. The persons assessed by commissioners of sewers appointed under 23 Hen. 8, c. 5, were to be rated according to the extent of their lands: Com. Dig. Sewers E. 2, and *Case of Isle of Ely* (1); and the same rule ought to be followed as to rates imposed pursuant to the Land Drainage Act, 1861. In the *Case of the Level of Hull* (2), the rate was levied at a certain amount per acre, and on this point the case is an authority for the plaintiff. Moreover, the assessment ought to be on land only without taking into account the increase in its value by the erection of buildings. The chief objection to the rate, however, is that it is levied on the occupiers and not on the owners of the property within the district. The object of the Act is to benefit agriculture, and the drainage of the land by new works permanently increases its value, therefore, those who have a permanent interest, that is, the owners, ought to pay for the improvement. It is necessary to incur preliminary expenses before undertaking new

(1) 10 Rep. 143 a. (2) 2 Str. 1127.

1871

GRIFFITHS v. LONGDON DRAINAGE BOARD.

works, and those expenses are subsidiary to the new works, and therefore the amount ought to be levied by a special rate under s. 38, which is to be a tax on the owners.

Dowdeswell, Q.C., for the defendants. The rate is valid. Sect. 38 provides that all costs, charges, and expenses may be defrayed by rates which are to be levied on the occupiers; an exception is made as to the expenses of improvements in existing works, or new works costing more than 1000*l.*, for which a rate is to be levied on the owners. But before the owners can be rated the improvements must have been made, or new works must have been built. In the present case no improvements have been made, nor have new works been done pursuant to the plans; the board could not, therefore, make a special rate. If the expenses do not come within the special rates, they must fall within the purposes for which the general rate is levied, and must be paid by the occupiers.

BLACKBURN, J. In this case I think that judgment must be given for the defendants. The question which we have to determine is whether the rate was or was not void. If void, the distress was invalid. If, on the other hand, the rate was good, we must give judgment for the defendants.

The rate is on the occupiers of lands in the Longdon and Eldersfield drainage district, for the purpose of defraying the costs, charges, and expenses incurred by the Longdon and Eldersfield Drainage Board.

An objection was made, which I may dispose of at once. It was said that if this was a rate under the Land Drainage Act, it ought to be an acreage rate, that is, the persons assessed ought to be rated according to the extent of their land, and not according to its value; and a second objection incidental to the preceding has been raised, although it has not been seriously argued, that the rate ought to be levied only upon land, and that the increase in its value by the erection of houses or other improvements ought not to be taken into account. But these objections seem to be quite untenable, for the Sewers Act, 32 Hen. 8, c. 5, has always received the construction that the rate is to be levied upon those who are benefited by works according to the value of their

properties: *Rex* v. *Commissioners of Sewers for Tower Hamlets* (1); and it would be unjust if the construction of the Act were to be that the rate was to be levied according to the superficial extent of the land benefited by the drainage, and not according to its value. In the present Act, by s. 69, the number of votes given to those who are to elect the drainage board is according to the rateable value of their property. This clearly shews that the value of the land, and not the extent of it, is to be taken as the basis for ascertaining the amount to be assessed upon it.

The substantial question in the case is, whether the rate should be made upon the owners and not upon the occupiers of the land. It is to be observed that the rate was for the purpose of paying for plans made for works proposed to be done under the Act. By s. 67, the drainage board have the same power that the commissioners of sewers would have. We must therefore ascertain the powers of the commissioners of sewers, and we find in s. 38, that rates may be levied by commissioners of sewers, "for defraying all costs, charges and expenses incurred, or to be incurred by them under the authority of any Act of Parliament, law or custom." And the question turns on regulation 2, par. 1. The question resolves itself into this: Ought this expenditure to be defrayed by a special rate, in which case the rate ought to be levied on the owners of the land; or is the object of the expenditure one of those general purposes of the Act for which an assessment ought to be made upon the occupiers. In the latter case this rate is valid. The amount of the rate seems excessive, and if an appeal had been brought a great portion of this expense might have been disallowed; but I think it very clear that the expenditure does not come within the objects of a special rate, and does not fall upon the owners? The expenses must be included in the general rate, which falls upon the occupiers? The language is not very explicit. It is, however, plain, from s. 29, that it is the duty of the commissioners, before commencing works, to cause plans to be made of the proposed works, and an estimate of the expense. The board acted under these powers; but the proprietors objected, under s. 31. Speaking for myself only, I am inclined to think that if the works had been done, a large portion of the preliminary

(1) 9 B. & C. 517.

1871

GRIFFITHS v. LONGDON DRAINAGE BOARD.

expenses, such as surveying, making plans, which would be necessarily done for the estimate, would also have been expenses necessary for executing the works, and I am inclined to think that those might all be charged upon the special rate. But we need not inquire into that. The importance of s. 31, as bearing upon the present point, is, that there is an express enactment that the commissioners may repay the expense out of the rates, after the work has been done. The provision at the end of s. 31 clearly does not come into operation where the works have been stopped by the proprietors refusing their assent. How, then, are the abortive preliminary expenses to be paid? I think they are to be treated exactly as they would be if the board, on reading the report, had rejected it. The expense would then be payable out of the general rate, and it could not possibly be said that this was a charge to fall upon the owners under a special rate.

I have come to the conclusion that the object with which this money was levied was to provide for an expenditure which was to be paid out of the general rate under the Act; and consequently that this rate is good, and was made for a purpose within the jurisdiction of the board.

LUSH, J. I am of opinion that, where the works have not been done, the preliminary expenses are not a charge upon the owners. The general expenses are chargeable by rate upon the occupiers. The preliminary expenses the board were authorized to incur for the purpose of laying the scheme before the owners; and it is to be observed that it is only where the estimated expenses will exceed the 1000*l.* that they are authorized to charge the owners of land. If these works had been estimated to cost less than 1000*l.* the board might have done them, and in that case they must have been paid for by the occupiers, and a rate must have been made upon the occupiers. It is only in cases where the outlay is to exceed 1000*l.* that the owners are chargeable. Then, by s. 31, before owners are chargeable they must be consenting parties to the work; for after having had a scheme laid before them, if within two months the proprietors of one-half of the area of land within which a rate is, according to the notice, proposed to be levied, declare in writing to the board that they are unwilling that such works shall be

executed, the board shall take no further steps therein. Therefore the intention of the legislature is that the owners shall not be chargeable, except in a case where the works exceed 1000*l.*, and then only in a case where more than one-half of their number shall consent to the works being done: they are not to be chargeable without their consent, and in all other cases the expenses are to be defrayed by a rate upon the occupiers: that leads me to the conclusion that it was not intended, where the works were not done, and where the owners dissented from their being done, that the owners should be deemed to have incurred any expense whatever. These preliminary expenses, which the board were authorized to incur under the Act, must, like all other expenses, be defrayed by a rate upon the occupiers. I therefore think that the rate is valid.

HANNEN, J. I am of the same opinion. I think it is in the highest degree probable that that state of things which gives rise to this question was not contemplated by the legislature. But, I think, when the second regulation of s. 38 comes to be considered, it appears clear that the only state of things which justifies the making of a special rate is, where the improvements or new works themselves involve an expenditure of more than 1000*l.* Therefore, until there has been an execution of the works themselves, the case which was contemplated for the imposing of a special rate has not arisen. And as the case is not brought within the particular words of that regulation of s. 38, it follows of necessity that it must be brought under the other division, and that the board must be put in funds to meet this particular expenditure by means of a general rate as distinguished from a special rate.

Judgment for the defendants.

Attorneys for plaintiff: *Clarke, Son, & Rawlings.*
Attorney for defendants: *F. G. Norcutt.*

1871
July 6.

GANDY *v.* THE ADELAIDE MARINE INSURANCE COMPANY.

Ship and Shipping—Marine Insurance—Material Fact, Concealment of—Degradation of Ship in Lloyd's Register.

By the rules of Lloyd's register, a ship classed in it A. 1., for seven years, in order to retain that position is required to undergo a half-time survey in the fourth year, the result of which is reported to the committee. If the survey is satisfactory to the committee, the ship retains her class, and the letters "H. T.," with the date of the survey, are placed opposite the entry of her name, &c. If the report is not satisfactory, she is degraded from her class; and if the survey is not had, or is declined by the owner, she is struck out of the register. The time for the half-time survey is not strictly observed. Every subscriber has a copy of the register; and in the case of London subscribers, the books are sent weekly to Liverpool for correction, where they are posted up and returned the next day.

The plaintiff was the owner of the bark *Annie*, which was classed in the register in November, 1865, as A. 1. for seven years. In October, 1869, she was lying for repairs at Liverpool, and Lloyd's surveyor informed the plaintiff by letter that the *Annie* was due for half-time survey, and requested to know when she would be ready for survey; the plaintiff replied that he had decided not to continue the *Annie* in Lloyd's book. On the 28th of October, the plaintiff's agent in London, pursuant to his directions, applied to the defendants to know at what rate they would insure the *Annie* for twelve months; the defendants were subscribers to Lloyd's register, and their underwriter referred to the entry in the register as to the *Annie*, and asked the plaintiff's agent whether that was the ship he wished to insure, to which he replied "Yes." She then stood as A. 1., for seven years from 1865. The underwriter gave the rate of insurance as of a ship classed A. 1., and on the 15th of November the ship was initialed for insurance, and a policy was issued and dated the 1st of December, 1869. On the 16th of November the *Annie* was struck out of Lloyd's register, and notice was given to the plaintiff on the 17th. On the 23rd of November the defendants' copy of the register was returned to them with the entry as to the *Annie* struck through. On the 31st of December she was wrecked and became a total loss. An action having been brought on the policy, the defendants pleaded concealment. At the trial, on the above facts, the judge refused to direct a verdict for the defendants on that plea, but reserved the point; and he left to the jury the questions, 1. "Was the fact that the plaintiff had resolved not to continue the ship on the register, and had so stated to the surveyor, material?" To which the jury answered "No." 2. "Ought the underwriter, on the 15th of November, to have known that the continuance of the class must depend on whether the ship had been then lately surveyed and passed, or would within a few days be surveyed and passed, or repaired; and if 'yes,' ought the knowledge to have put the underwriter to ask whether she had been surveyed or was about to be surveyed?" To this the jury answered "Yes;" and a verdict was thereupon entered for the plaintiff. On a rule to enter a verdict for the defendants, and for a new trial:—

Held, by the whole Court, that the case was rightly left to the jury; and that there had been no misdirection.

By Mellor, Lush, and Hannen, JJ., that the verdict ought not to be disturbed;

but by Cockburn, C.J., that the fact that the plaintiff had decided not to continue the *Annie* on the register was a material fact which ought to have been communicated, and that there ought therefore to be a new trial.

DECLARATION on a policy of insurance of the 1st of December, 1869, on the ship *Annie* for twelve months from the 1st of December, 1869, to the 30th of November, 1870, which the defendants executed and underwrote for 300*l.* on a premium of seven guineas per cent.; and alleging a total loss of the ship on the 31st of December, 1869, by perils of the seas insured against. (1)

Pleas, inter alia, that defendants were induced to execute the policy, and to become insurers to plaintiff, by the misrepresentation of plaintiff and his agents, and by the wrongful and improper concealment by plaintiff and his agents from defendants of certain material facts then known to plaintiff and unknown to defendants, and which ought to have been communicated to the defendants by plaintiff and his agents.

Issue thereon.

The particulars of concealment, delivered pursuant to judge's order, were: Whereas the vessel, when the insurance was offered to defendants and accepted by them, stood in the register book under class A., the plaintiff, who was the managing owner, had at the time the intention she should go out of the book, and with that intention had refused to subject her to the survey, which, according to the rules of the book, she must have undergone to entitle her to keep her class, and to which the surveyor of the book, by letter, required her to be subjected. The consequence was, that she was insured at a first-class premium; whereas, if the truth had been known, she would not have been insured at all.

At the trial before Brett, J., at the Liverpool Winter Assizes, 1870, a verdict was entered for the plaintiff, with leave to move to enter a verdict for the defendants, if the Court should be of opinion that he ought to have directed a verdict for the defendants on the plea of concealment.

The facts on which the judgment of the Court proceeded, the course of the trial, the findings of the jury, &c., are fully stated in the judgment delivered by Mellor, J.

(1) There was a second count on another policy, but the judgment of the Court turned entirely on the first policy.

1871

GANDY v. ADELAIDE INSURANCE CO.

A rule was afterwards obtained to enter the verdict for the defendants pursuant to the leave reserved, on the ground that the plea of concealment was proved as a matter of law, so that the jury ought to have been directed to find that issue for the defendants; or for a new trial, on the ground that the judge misdirected the jury in telling them that there was in fact no misrepresentation, that the insured might have changed his mind as to continuing the classification of his ship, and in not directing them that defendants were not, under the circumstances, put upon inquiry; and also on the ground that the verdict was against the weight of evidence.

June 8. *Benjamin* shewed cause. There was no concealment on the part of the plaintiff of any material fact that ought to have been communicated to the defendants as not being practically known to them. The fact that the plaintiff had determined not to have his ship surveyed and kept on Lloyd's book was not material; he might have changed his mind. At all events, it did not render the vessel ipso facto degraded. But if the fact were material the plaintiff had a right to take for granted that the ship would be struck out; or that the defendants, being subscribers, would know that the time for the half-time survey had arrived, and that the absence of "H. T." shewed that this survey had not yet taken place. The defendants' underwriter had the book before him, and ought to have been able to read his own book. Further, the mere signature of the slip is not the contract. By 30 Vict. c. 23, s. 7, the slip is no contract: *Mackenzie* v. *Coulson* (1); *Parry* v. *Great Ship Co.* (2); and at the time the contract was made, by the execution and delivery of the policy on the 1st of December, the defendants had the knowledge that the *Annie* was struck out of the register; for the book was returned to the defendants with this erasure on the 23rd of November.

Butt, Q.C., and *Herschell*, in support of the rule. The last point is not maintainable. The premium was settled on the basis that the ship was still classed A. 1., after the defendants' underwriter had turned to the book and found the entry still standing. The dates were not sufficient notice to the underwriter to inform him

(1) Law Rep. 8 Eq. 368. (2) 4 B. & S. 556; 33 L. J. (Q.B.) 41.

that the survey ought to have taken place, or even to put him upon inquiry. The plaintiff's agent, as well as the defendants' underwriter, thought that the ship was still A. 1.; and the plaintiff well knew that he had obtained the insurance at the rate of seven guineas upon that supposition. No doubt the ship was struck out of the register before the policy was executed, but it was after the terms had been agreed upon by the initialing of the slip; and the defendants were not bound to look into the matter after that, as it is well known that the initialing the slip is in practice, though not in law, the entering into the contract, and all that takes place afterwards is mere matter of routine. All that *Mackenzie* v. *Coulson* (1) decided is, that the slip is not evidence of a contract: but it does not shew that, when the terms of a contract are arranged, the contractors are bound by any means of knowledge which may afterwards come into their possession. The book, at the time the premium was agreed on, stood unaltered, and there was nothing then to shew that the half-time survey ought already to have taken place, as it was found that the time for the survey is never strictly observed; still less was there anything to shew that the plaintiff had determined not to have the *Annie* surveyed; and that was the material fact, which the plaintiff knew, and the defendants did and could not know, and which the plaintiff ought, therefore, to have communicated. The facts of *Bates* v. *Hewitt* (2) were stronger in favour of the plaintiff than the present, and yet the defendants were held entitled to the verdict. It was held by the Court, that, if a material fact be not communicated, even although it had been once known to the underwriter, yet if it be not present to his mind at the time of effecting the insurance, the non-communication affords a good defence to the underwriter; and it is not sufficient for the assured to shew that the particulars supplied by him, coupled with the underwriter's previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated. That is much further than it is necessary to go in support of the defendants' contention in the present case.

Cur. adv. vult.

(1) Law Rep. 8 Eq. 368.

(2) Law Rep. 2 Q. B. 595.

1871

GANDY v. ADELAIDE INSURANCE CO.

July 6. The judgment of Mellor, Lush, and Hannen, JJ., was delivered by

MELLOR, J. The plaintiff in this case was the owner of the bark *Annie*, built at New Brunswick, in 1865, in which year he had purchased her, she being at the time classed at Lloyd's A. 1. for seven years from 1865; she was in fact classed in November, 1865. (1) In October, 1869, she was lying in the Canning Graving Dock at Liverpool for some repairs, and on the 22nd of October the surveyor of Lloyd's at Liverpool wrote a letter to the plaintiff, whereby he informed him that the bark *Annie* was then due for half-time survey, and requested to know when she would be ready for survey. To this letter the plaintiff replied on the 23rd of October, as follows:—"In reply to your memo. to hand, I beg to say that I have decided not to continue the *Annie* in Lloyd's book."

By the rules of Lloyd's (2), a ship classed A. 1. for seven years, in order to retain that position in the register, is required to undergo a half-time survey, and upon the report of such survey it is decided by the committee of Lloyd's register, to whom such report is referred, whether she shall retain her classification of A. 1., or

(1) The entry contained minute details as to the *Annie's* build, &c. The material parts were as follows: *Annie*; bk., 345; N. Bruns. 1865, 6 mo.; 7 A. 1., 11,65. Meaning that the *Annie* was a bark of 345 tons register, built at New Brunswick, and launched in June, 1865; classed A. 1. for seven years, having been surveyed and classed in November, 1865.

(2) Rule 33. Ships A. will consist of new ships, and those which have not passed the prescribed age, provided they are kept in a state of complete repair and efficiency. The character A. will not, however, be granted to any vessel unless satisfactory evidence of the date and build and place where built is produced.

Rule 34. The number of years to be assigned for this character to be determined with reference to the original constitution and quality of the vessels, materials employed, and the mode of building; and their continuance for the time so assigned to depend on its being shewn by occasional surveys, annually if practicable, that their efficiency is duly maintained. The characters of ships classed A. will be struck out of the ship's book, unless they be submitted to the following intermediate survey, within periods not exceeding four years in the case of vessels classed eight years and under, either originally, on restoration, or on continuation, and within periods not exceeding half that assigned in vessels classed for longer terms. The survey will be registered in the register-book thus: "H. T." (half-time), with the date of the survey affixed.

[The Rule then gave details as to the manner of making the survey.]

shall be degraded from that class. If the survey is satisfactory to the committee, the ship retains her classification, and in that case the letters "H. T." are placed opposite her name and description in the register, and the date of the survey is affixed; but these letters are only so placed after she has satisfactorily undergone the half-time survey. If the report is not satisfactory, she is degraded from her class, and if a survey is not had, or is declined, she is struck out of the register. The time for half-time survey is not, in practice, strictly observed in certain cases, as if, for instance, the ship is at sea. Every subscriber to Lloyd's obtains a copy of the register, and, in the case of London subscribers, the books containing the register are sent weekly to Liverpool for correction, where they are posted up and returned the next day. Every subscriber to Lloyd's can get any information he requires by going to the secretary of Lloyd's registry.

On the 28th of October, Messrs. Banks & Co., the plaintiff's brokers at Liverpool, instructed Messrs. Maclean & Co., brokers in London, to ascertain and telegraph to them "to-morrow" at what rate they could insure "the *Annie*, of Liverpool, 345 tons, built at New Brunswick, 1865, for twelve months, being intended to take coal from this to Gibraltar or a Mediterranean port, and to bring home ore from Sicily or Pomaron, and will probably continue in this trade." These were the instructions upon which the insurance was subsequently effected with the defendants on the 15th of November. On receipt of the letter from Banks & Co. of the 28th of October, Mr. Wright, a partner in the firm of Maclean & Co., went to the defendants' office to ascertain at what rate the insurance could be effected, and read the letter of the 28th of October to Mr. Kemp, the defendants' underwriter. A copy of Lloyd's book was then in the office, and the entry as to the *Annie* was referred to by Mr. Kemp, who asked Mr. Wright, "Is this the ship you wish to insure?" To which Wright replied, "It is." She then stood in the book classed A. 1., seven years from 1865; and thereupon Kemp gave Wright a quotation of the rate at which he would insure; (1) and ultimately, on the 15th of November, the ship was initialed for an insurance of 300*l.*, and

(1) The premium being seven guineas per cent., the current rate of insurance a vessel classed A. 1.

1871

GANDY v. ADELAIDE INSURANCE CO.

the policy was in due course issued, and dated the 1st of December, 1869. (1)

The *Annie* was, in fact, struck out of Lloyd's register on the 16th of November, and the plaintiff was informed thereof on the 17th by letter stating that his vessel, not having passed the survey, had been struck off the register. The *Annie* was wrecked, and became a total loss on the 31st of December, 1869.

At the trial, the defendants' counsel contended that the judge ought, as matter of law, to direct a verdict to be entered for the defendant on the plea of concealment. The judge, however, declined to do so; but at the end of the case he reserved leave to the defendants' counsel to move to have the verdict entered for the defendants, if this Court should be of opinion that he ought so to have directed.

The judge left to the jury several questions, and amongst them the following:—"Was the ship, on the 15th of November, in the ordinary business sense, degraded from her class?" To which the answer of the jury was, "No." "Was the fact that plaintiff had resolved not to continue the ship on the list, and had so stated to the surveyor, a material fact?" To this question the jury answered, "No." He then asked the jury, "Ought the underwriter to have known, on the 15th of November, that the continuance of the class must depend on whether the ship had been then lately surveyed and passed, or would within a few days be surveyed and passed, or repaired; and if 'yes,' ought the knowledge to have put the underwriter to ask whether the ship had been surveyed or was about to be surveyed?" To this question the answer of the jury was, "Yes." The verdict thereupon passed for the plaintiff.

The defendants' counsel, in Hilary Term, obtained a rule to enter the verdict for the defendants, pursuant to the leave reserved; and for a new trial on the ground of misdirection by the judge, in telling the jury, that there was in fact no misrepresentation, that the assured might have changed his mind as to continuing the classification,

(1) The defendants' copy of Lloyd's book was sent for the usual posting-up on the 20th of November, and was returned to them on the 23rd of November, the entry as to the *Annie* being struck through; but it appeared in evidence that no reference was made by the defendants to the register, after it had been altered, and they were ignorant of the fact of the vessel having been struck out, when the policy was executed.

and that the defendants were not, under the circumstances, put upon inquiry; and also that the verdict was against the weight of evidence.

On the argument, it was not insisted that there was any misrepresentation, in point of fact, on the part of the plaintiff, and we have only to determine:—Firstly, whether the judge was bound, under the circumstances, to direct the jury, as matter of law, that the verdict on the plea of concealment must be found for the defendants; secondly, whether there was any misdirection by the judge; and lastly, whether the verdict was against the weight of evidence.

As to the first question, we are clearly of opinion that the judge was quite right in refusing to direct the jury, as matter of law, that the plea of concealment was proved. Without putting it to the jury to draw the proper inferences from the facts proved, there was not in the facts themselves enough to enable the judge to say "aye" or "no" that there had been the concealment of a material fact; and, under the circumstances of the case, it was impossible to withdraw the question from the jury.

It appears to have been contended on the trial that the ship became, in fact, a degraded ship, by virtue of the resolution expressed in the letter of the 23rd of October, but this was not insisted upon on the argument, except so far as it was included in the question of materiality.

The misdirection complained of resolves itself into two distinct matters:—First. That the judge, in directing the attention of the jury to the question with regard to the materiality of the resolution of the plaintiff not to continue the *Annie* in Lloyd's book, and his communication thereupon to the surveyor of Lloyd's on the 23rd of October, submitted to the jury whether there was anything in those circumstances to preclude the plaintiff from changing his mind and submitting to a survey and continuing the classification of the ship at Lloyd's, and whether, if the underwriter had been told of those circumstances, he might not have said or thought, "Well, he may change his mind."

Now it is to be observed that this was not a direction in point of law, but merely consisted of observations for the consideration of the jury; and unless we are of opinion that the resolution expressed in the letter of the 23rd of October was a material fact, we

1871

GANDY v. ADELAIDE INSURANCE CO.

ought not, because of observations of which we may not altogether approve, to hold that they amount to a misdirection. Can we then say that it was a necessary or material fact? The effect of it could not be greater than that of refusing to submit the ship to "the half-time survey," the necessary consequence of which, according to Lloyd's rules, would be to exclude the ship from the register. Is it anything more than an answer to a notice that the time had arrived for the survey declining such survey? If the mere fact of the ship not undergoing "the half-time survey" would in fact exclude her from Lloyd's register, what necessity was there on the part of the plaintiff to disclose circumstances which only could affect the result by virtue of the rules of Lloyd's with regard to "the half-time survey?"

The plaintiff's answer declining a survey could not be otherwise important than as it affected the proceedings of Lloyd's committee under the rules. As a resolution of his own it was of no consequence, and it was only as his answer to the demand for a survey that it could acquire importance; and so far as the plaintiff was concerned, it amounted to neither more nor less than declining a survey, and a desire to remove the ship from Lloyd's register.

The value of the classification of the ship as A. 1. for seven years at Lloyd's, in the eyes of an underwriter, can only depend upon the supposition that Lloyd's rules have been and will be observed, and that it will not be classed, or retain its class, except after proper surveys. Under such circumstances can we say affirmatively that the fact was material; and if we cannot, was it not clearly right to put it to the jury?

It was further contended that the judge misdirected the jury by leaving to them "whether the underwriter ought to have known, on the 15th of November, that the continuance of the class must depend on whether the ship had been lately surveyed and passed, and if 'yes,' ought this knowledge to have put the underwriter to ask whether the ship had been surveyed, or was about to be surveyed?" This, of course, depends upon whether, in the very nature of his profession, as an underwriter and a subscriber to Lloyd's registry, he ought not to have been sufficiently acquainted with the rules and practice of the association of which he was a member to have been able, with understanding, "to read

his own book," as Mr. Benjamin expressed it. Primâ facie, we should think that every underwriter who relies upon the classification of a ship in Lloyd's register, as determining the rate of insurance, ought to be acquainted with the rules and practice which give the classification its value. In the present case, the underwriter did refer to Lloyd's book before he gave his quotation, and if he had taken ordinary pains, and was, as we are entitled to presume that he ought to have been, acquainted with the rules, he ought to have seen at once that the period for the half-time survey had passed, and that as yet no letters "H. T.," with the date of the survey, were appended to the description of the ship in the register.

It was contended by Mr. Benjamin that, as mere matter of professional knowledge, the underwriter, looking at the book for the classification of the ship, and not finding the letters "H. T." and the date of the half-time survey there, ought at once to have seen the propriety of asking how and why it was that the ship had not undergone her half-time survey; and that not having done so he had been guilty of negligence which disentitled him to complain that he had been at all misled by any want of communication on the part of the plaintiff.

We think that this question was rightly left to the jury, and that the present case is entirely distinguishable from that of *Bates* v. *Hewitt* (1), which was much relied upon by the defendants' counsel. It was there said by the Lord Chief Justice in his judgment, that "no proposition of insurance law can be better established than this, viz., that the party proposing an insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the assured. It is true, if matters are common to the knowledge of both parties, such matters need not be communicated. It is also true, that when a fact is one of public notoriety, as of war, or where *it is one which is matter of inference, and the materials for informing the judgment of the underwriter are common to both*, the party proposing the insurance is not bound to communicate what he is fully warranted in assuming the underwriter already knows." And Mellor, J., (2) quotes from Lord Mansfield's

(1) Law Rep. 2 Q. B. 595, 604. (2) Law Rep. 2 Q. B. at p. 609.

1871

GANDY v. ADELAIDE INSURANCE CO.

judgment in *Carter* v. *Boehm* (1), as follows: "An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew; what way soever he came to the knowledge. *The insured need not mention what the underwriter ought to know;* what he takes upon himself the knowledge of; or what he waives being informed of." And Shee, J., expressly says (2), "He is not bound to communicate facts or circumstances *which are within the ordinary professional knowledge* of an underwriter." It is therefore, as it appears to us, impossible to contend successfully that there was any misdirection on the part of the judge in leaving this question to the jury. The rule, therefore, so far as it relates to the entering the verdict for the defendants, or to imputed misdirection by the judge, must be discharged.

It only remains to consider whether there ought to be a new trial, on the ground that the verdict is so unsatisfactory on the questions of fact left to the jury that we ought not to allow it to stand. For the reasons already assigned in discussing the question of misdirection, we think that we cannot come to that conclusion, and that there was evidence on both questions fit to be submitted to the jury, and that we cannot say that they were wrong in the conclusion at which they arrived.

The rule, therefore, on this ground also will be discharged.

COCKBURN, C.J. I regret to be unable to concur with my learned Brothers in the judgment which has just been read.

I am of opinion that the fact that the survey of the vessel, necessary to enable her to keep her class in Lloyd's register, had been declined by the owner, was a material fact, and one which ought to have been communicated to the underwriter.

The retention of a vessel in Lloyd's register as of the class A. 1. is so important to the owner, as promoting the profitable employment of the vessel, that the refusal to submit to the survey necessary to enable her to retain her class leads fairly to the inference that the owner is conscious that the condition of the vessel has so far deteriorated that the result of the survey would be unfavourable. And, as the degradation of the vessel from her class is the necessary consequence of the refusal to submit to the survey, the

(1) 3 Burr. at p. 1910. (2) Law Rep. 2 Q. B. at p. 610.

fact of such refusal would produce the same effect on the mind of the underwriter as if the vessel had actually been degraded, and he had become aware of it. Now, the degradation of a vessel from her class appears to me important, as necessarily carrying with it the presumption that a deterioration in the condition of the vessel has taken place, a circumstance, of course, calculated materially to influence the decision of the underwriter as to the amount of premium he will require as the consideration for undertaking the risk.

I take it that if an underwriter, not being a subscriber to Lloyd's, who had been in the habit of insuring a vessel represented to him as classed A. 1. in Lloyd's register, were asked to renew the insurance at a time when the vessel had been degraded from her class,—this not being within his knowledge,—the degradation of the vessel would be a fact the omission to inform him of which would amount to concealment of a material fact. If so, the refusal to submit to the survey being, as it seems to me, equivalent to degradation, the fact of such a refusal was, in my judgment, a material fact which ought to have been communicated to the underwriter, unless the latter knew, or ought to have known it.

And this brings me to the second question. Now, I entirely adhere to the doctrine laid down in *Bates* v. *Hewitt* (1), namely, that a party proposing an insurance is not bound to communicate to the underwriter that which the underwriter already knows, or that which in the course and conduct of his business he ought to know, and may properly be taken to know, or that which may be matter of inference from materials common to both parties.

The first of the three cases does not arise here. It is clear that the underwriter did not know of the owner's refusal to submit to the survey. It is said, indeed, that, as the plaintiff had given notice to the agent of Lloyd's at Liverpool that he would not have the vessel surveyed, this was sufficient to affect the underwriter with knowledge. I cannot concur in this view, as it appears that in the discharge of his duty the surveyor would communicate the fact of the refusal, not to the subscribers, but to the committee alone, who, again, do not communicate the fact to the subscribers until they have actually caused the vessel to be degraded from her class. The underwriter would therefore have neither actual know-

(1) Law Rep. 2 Q. B. 595.

1871

GANDY v. ADELAIDE INSURANCE CO.

ledge, nor the means of knowledge, from the report made by the surveyor to the committee of Lloyd's.

The question whether the case comes within the second branch of the proposition to which I have referred is one of greater difficulty. The date of the building of the ship being stated in the register, which the underwriter had before him, he might have seen, had he reflected, that half the time for which she was originally classed had expired; and, the letters "H. T." not appearing against the name of the ship, he might have inferred that the necessary survey had not been had, and that, consequently, the ship would now be degraded from her former class. I should feel the force of this argument, if vessels were uniformly degraded unless surveyed on the expiration of half time. But such, it is admitted, is not uniformly the practice. While it is competent to the local surveyor to call on the shipowner, on the expiration of the half time, to submit to a survey, as the condition of the vessel keeping her class, it appears that this is by no means uniformly done, and that vessels are suffered to remain as of their former class though the half time has expired and no fresh survey has been held. I think, therefore, that the underwriter, though, if his attention had been called to the ship's age, he might have seen that the half time had expired, and from the absence of the letters "H. T." might have inferred that no survey had been held on her, must not be taken to have been bound to infer that the owner had refused to have her surveyed.

Adhering to what I said in *Bates* v. *Hewitt* (1), that where a fact is "matter of inference, and the materials for informing the mind of the underwriter are common to both parties," both may be left to draw their own inferences, I am reluctant to apply that principle to a case like the present, where a material fact is matter of *positive knowledge* to the party proposing the insurance, and only matter of *possible inference*, from very imperfect materials, to the underwriter. It must never be forgotten that insurance is a contract in which uberrima fides is required, and that the assured is bound to disclose every material fact known to him, and unknown to the insurer, unless he is justified in believing such fact to be known to the latter. The plaintiff knew that he had refused to have his vessel

(1) Law Rep. 2 Q. B. at p. 605.

1871

GANDY v. ADELAIDE INSURANCE CO.

surveyed, and that her degradation must necessarily follow. It does not appear to me that the circumstances were such as to warrant the conclusion that the underwriter knew, or ought necessarily to have known, that the survey had been declined. I think the doctrine in *Bates* v. *Hewitt* (1) goes quite far enough for the protection of the assured, and I should be unwilling to extend it to a case like the present.

I quite concur in thinking that there was no misdirection on the part of the learned judge on the trial, and that he was quite right in not withdrawing the case from the jury; but I am of opinion that the facts do not warrant the findings of the jury; and I should myself have thought it right to send the case down to a new trial; but my learned Brothers think differently, and the rule must therefore be discharged.

Rule discharged.

Attorneys for plaintiff: *Gregory & Rowcliffes, for Hull, Stone, & Fletcher, Liverpool.*

Attorneys for defendants: *Waltons, Bubb, & Walton.*

[IN THE EXCHEQUER CHAMBER.]

June 15.

KEARNEY *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Evidence of Negligence—Owner of Real Property—Fall of Brick from a Bridge over a Highway—Railway Company.

As the plaintiff was passing along a highway under a railway bridge of the defendants, which was a girder bridge resting on a perpendicular brick wall, with pilasters, a brick fell from the top of one of the piers, on which one of the girders rested, and injured the plaintiff; a train had passed just previously; on examination afterwards, other bricks were found to have fallen out. The bridge had been built and in use three years. The jury having found a verdict for the plaintiff, a rule was obtained, pursuant to leave, to enter a nonsuit, on the ground that there was no evidence of negligence to leave to the jury:—

Held, affirming the judgment of the Court of Queen's Bench, that the defendants were bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, and that there was evidence from which the jury might infer negligence.

APPEAL by the defendants from a decision of the Court of Queen's Bench discharging a rule to enter a nonsuit, on the

(1) Law Rep. 2 Q. B. 595.

1871

KEARNEY v. LONDON AND BRIGHTON RAILWAY CO.

ground that there was no evidence of negligence to go to the jury.

The declaration stated that the defendants were possessed of a certain bridge over a certain road and public highway, whereby it became and was the duty of the defendants to maintain, uphold, fence, and keep in repair the said bridge, so that the said bridge, or any of the materials of which it was constructed, should not be injurious to or hurt any person passing under the said bridge, and that they so negligently and unskilfully maintained, fenced, and kept in repair the said bridge, and the materials of which it was composed, that by reason thereof, while the plaintiff was lawfully passing under the said bridge, a portion of the said bridge, and of the materials of which it was composed, fell down and struck the plaintiff, whereby the plaintiff was injured, &c.

Plea, not guilty; and issue thereon.

At the trial at Westminster, at the sittings after Michaelmas Term, 1869, before Hannen, J., it was proved on the part of the plaintiff that on the 20th of January, 1869, whilst passing along the Blue Anchor Road, Bermondsey, which is a public highway running under the defendants' railway, a brick from a perpendicular pier on the right hand side of the bridge fell upon his shoulder, inflicting certain injuries which prevented him from working for a considerable period. It appeared that iron girders rested upon the pier in question, and that the plaintiff was two or three feet from the wall when the brick struck him. The brick was produced in court, and the plaintiff stated that he shewed it to the station-master immediately after the accident. He further stated that on a subsequent occasion he had fitted it in the hole, and at that time he saw several other places from which bricks had fallen out since the accident. Before plaintiff was struck he heard a train pass, but did not see it. It was proved that the bridge and railway had been used for upwards of three years.

At the close of the plaintiff's case, the counsel for the defendants submitted that there was no evidence of negligence, and the learned Judge stated he should (if necessary) reserve the point. The defendants' counsel then called the station-master and other witnesses to prove that the brick never struck the plaintiff, and that his injuries were exaggerated; one of these, a builder named Webb,

who occasionally employed the plaintiff, being asked upon cross-examination whether he knew the bridge, said he did, but that he had not recently seen it; and upon re-examination the witness Webb stated that he often travelled on the line but had never noticed anything the matter with the bridge.

The learned judge left the question to the jury, whether they believed the plaintiff's or defendants' account as to the happening of the accident; and he took their opinion specially as to whether they thought there was negligence on the part of the defendants, either in the construction or maintenance of the bridge, reserving to the defendants, in case the jury found there was negligence, liberty to move to enter a nonsuit.

The jury found that there was negligence, and gave a verdict for the plaintiff, with 25*l.* damages.

A rule was obtained accordingly, which the Court of Queen's Bench discharged. (1)

Lopes, Q.C. (*Joyce* with him), for the defendants, used the same arguments and cited the same cases as in the Court below, and cited, in addition, *Blyth* v. *Birmingham Waterworks Co.* (2) and *Ryder* v. *Wombwell.* (3)

Murphy, for the plaintiff, was not called upon.

KELLY, C.B. We are all agreed that the judgment of the Queen's Bench must be affirmed. The declaration alleges a duty on the defendants to maintain and keep in repair the bridge, so that neither it nor any of the materials of which it was constructed should be injurious to any person passing under it. It is not necessary to consider whether any duty was imposed upon the defendants by statute; the defendants were under the common law liability to keep the bridge in safe condition for the public using the highway to pass under it. The declaration charges that the defendants were guilty of negligence; and there can be no doubt that it was the duty of the defendants, who had built this bridge over the highway, to take such care that, where danger can be reasonably avoided, the safety of the public using the highway should be provided for. The question, therefore, is, whether there

(1) Law Rep. 5 Q. B. 411. (2) 11 Ex. 781; 25 L. J. (Ex.) 212.
(3) Law Rep. 4 Ex. 32.

1871

KEARNEY v. LONDON AND BRIGHTON RAILWAY CO.

was any evidence of negligence on the part of the defendants; and by that we all understand such an amount of evidence as to fairly and reasonably support the finding of the jury. The Lord Chief Justice, in his judgment in the court below, said res ipsa loquitur, and I cannot do better than refer to that judgment. It appears, without contradiction, that a brick fell out of the pier of the bridge without any assignable cause except the slight vibration caused by a passing train. This, we think, is not only evidence, but conclusive evidence, that it was loose; for otherwise so slight a vibration could not have struck it out of its place. No doubt it is humanly possible that the percussion of the iron girder arising from expansion and contraction might have gradually shaken out the mortar, and so loosened the brick; but this is merely conjecture. The bridge had been built two or three years, and it was the duty of the defendants from time to time to inspect the bridge, and ascertain that the brickwork was in good order and all the bricks well secured. If there were necessity for other evidence, the case is made still stronger by the evidence of the plaintiff, which was uncontradicted on the part of the defendants, that after the accident, on fitting the brick to its place, several other bricks were found to have fallen out. The judgment of the Queen's Bench must be affirmed.

MARTIN, CHANNELL, and CLEASBY, BB., and WILLES, BYLES, and KEATING, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Fitch & Fitch.*
Attorneys for defendants: *Baxter, Rose, Norton, & Co.*

DRUMMOND AND OTHERS *v.* SANT AND OTHERS. 1871

July 6.

Statute of Limitations as to Realty (3 & 4 *Wm.* 4, *c.* 27)—*Trustee and Cestui que Trust—Effect of Occupation pursuant to Articles of Agreement for a Lease—Reversioner.*

A. entered into articles of agreement for leases of ninety-nine years from Lady-day, 1768, of certain building land abutting on the Thames with the trustees of D. who were tenants in fee. Soon afterwards, by 11 Geo. 3, c. xxxiv., A. and others were empowered to embank the Thames, and win part of the bed of it: and s. 2 enacted that the ground and soil of the river to be enclosed and embanked in the front of each house should vest in the owner of the house according to his respective estate, trust, or interest. A certain portion of the bed of the river, fronting the land on which he had built houses under his leases, was reclaimed by A. pursuant to the statute, and he occupied it more than twenty years before Lady-day, 1867. No lease of the reclaimed land was ever executed either by the trustees or by A. The leases, if they had been granted, would have expired at Lady-day, 1867. No rent was ever paid by A. in respect of the reclaimed land:—

Held, that by 11 Geo. 3, c. xxxiv., s. 2, the fee simple of the reclaimed land was vested in the trustees; and that their representatives were not barred by 3 & 4 Wm. 4, c. 27, and were entitled to the reclaimed land at Lady-day, 1867.

SPECIAL CASE stated pursuant to judge's order.

The action was in ejectment to recover a piece of land which adjoins another piece of land, formerly known as Durham Yard, but now known as the Adelphi Estate, and which formerly was reclaimed from the river Thames.

The defendants defended for the whole.

The facts of the case and the arguments fully appear in the judgment of the Court.

The following cases were cited in addition to those mentioned in the judgment: *Lisburne* v. *Davies* (1); *Doe* v. *Massey* (2); *Archbold* v. *Scully* (3); Darby and Bosanquet on the Statute of Limitations, p. 269.

June 23. *Manisty, Q.C.*, (*J. O. Griffits* with him), for the plaintiffs.

J. Brown Q.C., (*A. Wills* with him), for the defendants.

Cur. adv. vult.

(1) Law Rep. 1 C. P. 259.

(2) 17 Q. B. 373; 20 L. J. (Q.B.) 434.

(3) 9 H. L. C. 360.

1871

DRUMMOND v. SANT.

July 6. The judgment of the Court (Blackburn, Lush, and Hannen, JJ.) was delivered by

BLACKBURN, J. This is a special case stated in an action of ejectment.

It appears that in the middle of the last century the trustees of the Duke of St. Albans were seised in fee of a piece of land, then called Durham Yard, which was bounded on the south by the river Thames. The plaintiffs, it is admitted, have now got the estate of those trustees.

The trustees of the Duke of St. Albans made an agreement for a building lease with four brothers of the name of Adam, from whom the property derived its present name of the "Adelphi." The defendants derive their estate from those brothers.

At first this agreement was not reduced to writing, and the Messrs. Adam began their operations, trusting entirely to the good faith of the duke's trustees; but on the 23rd of June, 1769, articles of agreement under seal were executed, by which the trustees covenanted with Messrs. Adam that they, or the survivor of them, or the heirs of such survivor, should, when the messuages thereinafter covenanted to be built upon the said ground agreed to be demised should be tiled in, at the request and charges of Messrs. Adam, their administrators or assigns, "by one or more good and sufficient indenture or indentures of lease, not exceeding one lease for each house, and the expense of each lease not to exceed 5*l.* 5*s.*, including the registering thereof, demise to Messrs. Adam, their executors, administrators, and assigns," Durham Yard, to hold to them, their executors, administrators, and assigns, from Lady-day, 1768, for ninety-nine years, at and under the yearly rent of 1200*l.* And Messrs. Adam covenanted that they would, before twelve months from the date thereof, that is to say, the 23rd of June, 1770, tile in so many houses in and upon some part of the ground as to the satisfaction of the trustees should secure the payment of the rent of 1200*l.*

The portion of land to which this agreement applied, as already stated, extended to the Thames, which, to borrow the words of the Act of Parliament, which we shall immediately quote, at that time formed "a convex circular sweep," or, as we should call it, an arc.

It appears from the plan attached to the articles of agreement that it was in contemplation to make a straight embankment from one corner of this sweep to the other forming the chord of this arc, and so win from the Thames the land inside the chord to the arc. It is the land, or at least the greater part of the land, thus reclaimed that forms the subject of the present action.

Having discovered that they could not execute this purpose without the authority of parliament, Messrs. Adam and some other persons having interest in adjoining property promoted an Act of Parliament, 11 Geo. 3, c. xxxiv.

There can be no doubt, though it is not stated in the preamble, that this was done with the concurrence of the owners of the fee, then the trustees of the Duke of St. Albans. This Act, after reciting in the preamble that Messrs. Adam and the other promoters had valuable freehold and leasehold interests in Durham Yard, Salisbury Street, Cecil Street, and Beaufort Buildings *next adjoining* the river, and that they were willing to make the embankment in front of their respective properties at their own expense, authorizes them to do so, and then by s. 2 enacts, "That the ground and soil of the said river so to be enclosed and embanked in the front of such respective house, wharf, or piece of ground shall vest and the same is hereby vested in the owner or owners, proprietor or proprietors of such adjoining house, wharf, or ground respectively, according to his, her, or their respective estates, trusts, or interest."

The first question raised in the case was, as to the effect of this enactment. Mr. Brown, for the defendants, endeavoured to construe it as enacting that Messrs. Adam should have the fee simple in the land they thus reclaimed from the Thames at their expense; but we think it clear that it was intended that the reclaimed land should be held by the same title as the land in front of which it lay, and consequently that the fee simple of the reclaimed land along the frontage of Durham Yard vested in the trustees of the Duke of St. Albans, subject to the interests, legal and equitable, created under the articles of agreement of the 23rd of June, 1769.

The next question that arises is, what were those interests on the 8th of May, 1771, when the Act received the royal assent?

1871

DRUMMOND v. SANT.

Messrs. Adam had covenanted to tile in a sufficiency of houses by the 23rd of June, 1770, and though it is not expressly found in the case, we have no difficulty, under the power reserved to us of drawing inferences of fact, in coming to the conclusion that they had done this, and were therefore entitled to call upon the trustees to execute a lease or leases of the whole of Durham Yard and, according to our construction of the Act of Parliament, of the land reclaimed from the Thames for ninety-nine years.

They had exercised this right by getting several leases of different houses executed, the rents reserved on which, however, appear in the aggregate not to have amounted to 1200*l.*

Of the houses included in those leases two only come down to the old margin of the river.

The leases of those two houses are set out in the case; and it appears that those two leases each contained this express reservation, "Except and always reserved out of these presents the lowest range of vaults situate or being under the messuage or tenement hereby demised, and which are intended to be demised," by the trustees to Messrs. Adam.

So that it is plain that these leases did not comprise the actual original boundary of the Thames which was included in the vaults thus reserved, with the declared intention of making a subsequent lease of them; and, as it seems to us, à multo fortiori, they did not include any part of the reclaimed land which lay beyond these vaults.

The state of the title, at the time when the Act of Parliament came into operation, therefore, was, that a portion of Durham Yard was already under leases terminating at Lady-day, 1867, and that the residue of it, and the whole of the reclaimed land, was then held by Messrs. Adam as cestui que trusts in possession, having, under the articles of agreement of the 23rd of June, 1769, a right in equity to leases for ninety-nine years from Lady-day, 1768.

Leases were subsequently executed of all the different houses, the rents reserved in the aggregate, we presume, amounting to 1200*l.* per annum; but these leases carefully expressed what it was that was comprised in each, and no one of them included the portion of reclaimed land now in dispute.

This, it seems to us, was no oversight, but purposely done. The

object of Messrs. Adam in having separate leases made of the different houses was, that they might have it in their power to sell each lease separately; and it would have defeated their intention if the purchaser of the lease of a house could have claimed the wharf which was erected on the reclaimed land, or any portion of it, as part of what was comprised in his holding. Messrs. Adam might have required the owners of the fee to execute to them a lease of this land, but there was no object to be gained by them by so doing: as, if the owners of the legal fee had in any way interfered with their possession during the ninety-nine years, a Court of Equity would at once have interposed.

The owners of the fee had a right to call on Messrs. Adam to accept and execute a lease for this land, but as the rent of 1200*l.* was already adequately secured, it must have been a lease not reserving any rent; and until the passing of the 3 & 4 Wm. 4, c. 27, there was no motive to induce them to require this, as, till then, there could be no question that the possession of Messrs. Adam during the term could not be adverse, and time would be no more a bar to the reversioners after an equitable term than to those after a legal one. But it was argued for the defendants that the effect of the 3 & 4 Wm. 4, c. 27, was, as is said in *Nepean* v. *Doe* d. *Knight* (1), to do away with the doctrine of non-adverse possession; and that, consequently, after the lapse of five years from the passing of that Act, that is, in 1838, the title of the present plaintiffs was barred, although there never had been a moment up to the end of the ninety-nine years, that is, up to 1867, when they could have interfered with the possession without being liable to an injunction, and being punished for a breach of trust.

It is obvious that the legislature could never have intended this, and we think that there is nothing in the statute 3 & 4 Wm. 4, c. 27, producing such an effect.

In *Garrard* v. *Tuck* (2), the Court of Common Pleas put a construction upon that statute, according to which, where the possession is that of a cestui que trust, though his relation to his trustee may at law be that of tenant at will, the trustee's estate is not destroyed by mere lapse of time. That decision would be

(1) 2 M. & W. 894.

(2) 8 C. B. at p. 251; 18 L. J. (C.P.) 338.

1871

DRUMMOND v. SANT.

binding on us, even if we did not approve of it, as we do. But it was argued that the proviso at the end of s. 7 (1) must be limited to "express trusts," and for this the case of *Doe* v. *Rock* (2) was cited. The word "express" is not found in this section; but it may very well be that, in construing the Act, the terms "trustee and cestui que trust" are to be understood in the same way as, in *Beckford* v. *Wade* (3), the Privy Council held that the words "trust and trustee," in the Jamaica Statute of Limitations, were to be understood, that is, in the language of Sir William Grant, as meaning "actual express trusts as between cestui que trusts and trustees properly so called, on which length of time ought to have no effect"—an actual direct trust; not such possible, eventual trusts as may, in case certain facts are established in evidence, be declared in a court of equity; but, in the present case, the trust between the owners of the fee and those who held under the agreement of 1768 was an actual direct trust.

The case of *Doe* v. *Rock* (2) is confusedly reported; but it would seem that the owners of the legal fee had held it as trustees for Woolrick, who had purchased it from them, but failed to pay the price; then Woolrick sold his equitable fee to Butler at an advanced price. It would seem probable, from the report in Carrington and Marshman, that Butler actually paid the original price to the owners of the fee, and that they became trustees for him only, and that *afterwards*, by some arrangement not explained in the report, Woolrick became tenant at will to Butler, not to his trustees, except in so far as by implication every trustee may be said to be trustee for those who hold under his immediate cestui que trust. Thus understood, the ruling of Patteson, J., after consulting Cresswell, J., was, in truth, no more in effect than that

(1) 3 & 4 Wm. 4, c. 27, s. 7: "When any person shall be in possession or in receipt of the profits of any land, or in the receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always that no mortgagor or cestui que trust shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee.

(2) Car. & M. 549; 4 M. & G. 30.

(3) 17 Ves. 95.

where the cestui que trust would be barred if his title was legal, his trustee also is barred; a doctrine which in no way comes in question here, and which has since been acted upon in *Melling* v. *Leak*. (1) We come, therefore, to the conclusion that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Fladgate, Clarke, & Co.*
Attorneys for defendants: *Clarke & Son.*

THE GUARDIANS OF THE STOURBRIDGE UNION, APPELLANTS; THE GUARDIANS OF THE DROITWICH UNION, RESPONDENTS.

May 31.

Poor—Order of Removal—Settlement—Parish—Subdivision into Townships—13 & 14 Car. 2, c. 12, s. 21—The Union Chargeability Act, 1865, (28 & 29 *Vict. c.* 79.)

Where a parish consisting of several townships has maintained its own poor, and afterwards separate overseers are appointed for each township under 13 & 14 Car. 2, c. 12, s. 21, the parish is, for the purposes of settlement, destroyed; and a settlement gained in it by birth in one of the townships before the appointment is wholly lost, and the pauper does not acquire a fresh settlement in the particular township.

So held on the authority of decided cases.

This has not been altered by 28 & 29 Vict. c. 79, as that Act, in referring to an order of removal of a pauper settled in any parish, applies only to a parish actually existing for the purposes of settlement at the time when the order of removal is made.

CASE stated, under 12 & 13 Vict. c. 45, s. 11, on an appeal against an order of justices adjudging the settlement of Mary Ann Smith and her two children to be in the parish of Old Swinford, in the county of Worcester, in the Stourbridge Union, and ordering their removal to that union.

Mary Ann Smith was the widow of William Smith. The particulars of settlement relied on were that William Smith was the son of Samuel Smith, who was born in the parish of Old Swinford in or about the year 1804, and that the last legal settlement of Mary Ann Smith and her two children is in the parish of Old Swinford,

(1) 16 C. B. 652; 24 L. J. (C.P.) 187. 2 Jur. N.S. 757.

1871

STOURBRIDGE v. DROITWICH.

in virtue of the birth settlement of her late husband William Smith's father, Samuel Smith, in the parish of Old Swinford.

Samuel Smith was born in the township of Upper Swinford, in the ecclesiastical parish of Old Swinford, in the county of Worcester, in or about the year 1804.

The ecclesiastical parish of Old Swinford has existed from time immemorial with a parish church, and churchwardens have been from time immemorial, and still are, regularly appointed for that parish; but portions of the old ecclesiastical parish of Old Swinford have been from time to time separated off into ecclesiastical districts under the Church Building Acts, and at the time of the making of the order the only part of the old ecclesiastical parish of Old Swinford remaining was and is the township of Upper Swinford, in which the church and rectory are situate, and which still constitutes the ecclesiastical parish of Old Swinford, and the portions so separated off have been since such separation, and still are, distinct for all ecclesiastical purposes from the present ecclesiastical parish of Old Swinford, as provided by the Church Building Acts.

The ecclesiastical parish of Old Swinford did not, before the passing of the 28 & 29 Vict. c. 79, maintain its own poor, and there is not now, and there never was, any poor-rate made for such ecclesiastical parish, and there are no overseers appointed, nor were there any ever appointed for such parish. The ecclesiastical parish of Old Swinford was originally made up of a number of townships and hamlets. These townships are as follows: the township of Stourbridge, the hamlet of Amblecote, the township of Upper Swinford, in which the old parish church and rectory are situate, the township of Wollaston, the township of the Lye, and the township of Wollescote.

The township of Stourbridge has, from time immemorial, had separate overseers appointed for it, and a separate poor-rate has always been made for such township. In like manner the hamlet of Amblecote has, from time immemorial, had separate overseers appointed for it, and it also has had a separate poor-rate. The townships of Upper Swinford, Wollaston, the Lye, and Wollescote forming part only of the ecclesiastical parish of Old Swinford, from time immemorial, previously to the year 1842, were together called the parish of Old Swinford, and they had two overseers appointed

for such townships jointly, who were called the overseers of the poor of the parish of Old Swinford, and a poor-rate used to be made by such overseers for such last-mentioned four townships or hamlets, which jointly supported their poor.

The Stourbridge Union was formed in the year 1836, by an order of the Poor Law Commissioners for England and Wales, under the 4 & 5 Wm. 4, c. 76, s. 26, and by such order the parishes, townships, and places of Stourbridge, Old Swinford, Cradley, the borough of Hales Owen, Illy Hawn, Hasbury, Lutley, the Hill, Cakemore, Ridgacre, and Lapal, in the county of Worcester, and Kingswinford and Amblecote, in the county of Stafford, were formed into a union, called the Stourbridge Union.

In the year 1842, a rule for a mandamus was made absolute, commanding the justices to appoint separate overseers for the township of Wollaston, in pursuance of the statute 13 & 14 Car. 2, c. 12, s. 21, which they did, and such separate overseers have been annually appointed for that township, and a separate poor-rate has been since made for the same. In consequence of the decision of the Court of Queen's Bench in that case separate overseers have, since the year 1842, also been legally and regularly appointed for the township of Upper Swinford, the township of the Lye, and the township of Wollescote; and each of those townships has, since that period, had a separate poor-rate made for it by its own overseers. After separate overseers had been appointed in 1842 for the township of Wollaston, as before mentioned, by an order of the Poor Law Commissioners, dated the 18th of August, 1842, after reciting their order, dated the 19th of September, 1836, forming, under the provisions of the Act, 4 & 5 Wm. 4, c. 76, the Stourbridge Union, and that the parish of Old Swinford was still one of the places forming the Stourbridge Union, and reciting that the parish of Old Swinford comprised several townships, and, among others, the township of Upper Swinford and Wollaston, but that at the date of the order the poor of the parish of Old Swinford were maintained by such parish as the poor of one parish, but that since the date of the order the townships of Upper Swinford and Wollaston had been lawfully separated, for the maintenance of the poor thereof, from the parish of Old Swinford, and the other townships comprised therein, and that each of the townships of Upper Swinford

1871

STOURBRIDGE v. DROITWICH.

and Wollaston then maintained its own poor separately, the Poor Law Commissioners did, by their order now in recital, order and direct that one guardian of the poor should be separately elected for each of the said townships of Upper Swinford and Wollaston, with the qualification specified in the therein recited order wherein the Union was formed. Similar orders were made by the Poor Law Board as to the other two townships on separate overseers being appointed for them.

The whole of the township or hamlets which formerly constituted the ecclesiastical parish of Old Swinford are in the Stourbridge Poor Law Union. Since 1842, there has been no place with separate overseers, or with a separate poor-rate called Old Swinford, but there is still an ecclesiastical parish, as before mentioned, called Old Swinford, which is co-extensive with the township of Upper Swinford, in which Samuel Smith was born, which township is a place with separate overseers and a separate poor-rate.

It is contended by the appellants that there is no poor-law parish of Old Swinford, in which the paupers could be legally adjudged to be settled; and that the order in question is therefore void, as it, in point of fact, adjudges them to be settled "in the parish of Old Swinford;" the only parish of that name being an ecclesiastical parish, and not a parish with overseers, or a parish for which a separate poor-rate is made.

It is contended by the respondents that for the purpose of removal to the Stourbridge Poor Law Union, under the Union Chargeability Act, 28 & 29 Vict. c. 79, the paupers could be legally adjudged to be settled in the parish of Old Swinford, in the Stourbridge Union, or otherwise in the Stourbridge Union, by virtue of the birth settlement of Samuel Smith, in the township of Upper Swinford, in the parish of Old Swinford; and that the order is, therefore, properly made.

The question for the opinion of the Court is whether the justices were entitled, under the circumstances above stated, to make the order of removal.

Field, Q.C. (*Poland* with him) for the appellants. The order removing the pauper and her two children to the Stourbridge Union is bad. Samuel Smith, at the time of his birth, had a settle-

ment in the parish of Old Swinford, but, upon the division of that parish into separate townships maintaining their own poor, that settlement was destroyed, and he did not acquire a fresh settlement in the township of Upper Swinford. The cases of *Reg.* v. *Tipton* (1), *Reg.* v. *Hunnington* (2), and *Reg.* v. *Acton* (3), are conclusive on the point. A settlement can only depend on the state of things which existed at the time when it was alleged to be gained. The definition of a settlement, in Burn's Justice of the Peace, vol. iv., p. 316, is: "A settlement is the right acquired in any one of the modes pointed out by the poor laws to become a recipient of the benefit of those laws in that parish or place which provides for its own poor." At the time Samuel Smith was born, Upper Swinford did not provide for its own poor, and he acquired, therefore, no settlement there. *Reg.* v. *St. Martin, New Sarum* (4), is not in point, for it was decided on the words of a local statute; but the previous cases are there recognized. The Union Chargeability Act (28 & 29 Vict. c. 79) does not affect this case. The words of s. 2 are, "when any pauper, relieved in any such union, shall be settled in any parish situated in another union," the guardians of the union to which such pauper shall be chargeable may obtain an order of removal. That means that the pauper must have a settlement in a parish at the time the order of removal is made. It does not confer any new settlement. The parish of Old Swinford, for the purposes of settlement, was destroyed, and the pauper was not settled in any parish at the time the order was made. It is clear, from the authorities cited, that before the Act the pauper could not be removed; and s. 13 provides that "no alteration shall be made in respect of poor persons in parishes."

[COCKBURN, C.J. That statute does not appear to alter the law.]

Jelf (*H. Matthews, Q.C.*, with him), for the respondents. The case of *Reg.* v. *Tipton* (1), though followed, has not been approved of in the subsequent cases. Coleridge, J., in *Reg.* v. *Hunnington* (5), says: "If the matter were now open, I should wish to hear it more fully argued." And in *Reg.* v. *St. Martin, New Sarum* (6), Lord Denman, C.J., says: "The result of the cases arising upon the

(1) 3 Q. B. 215.
(2) 5 Q. B. 273.
(3) 8 Q. B. 108.
(4) 9 Q. B. 241.
(5) 5 Q. B. at p. 278.
(6) 9 Q. B. at p. 245.

1871

STOURBRIDGE v. DROITWICH.

division of Hales Owen may perhaps be regretted, but we had not the power to create a settlement by relation." The preamble of 13 & 14 Car. 2, c. 12, s. 21, shews the object of the section to have been to extend and not to narrow the operation of 43 Eliz. c. 2; and it is hard to see, upon the words of that section, how the decision was arrived at, unless it was forced upon the Court by the want of machinery to make such a settlement available. In *Reg.* v. *St. Martin, New Sarum* (1), which is, by analogy, an authority in favour of the respondents, the Court seems to have approved the argument used in favour of the settlement there set up: that "the whole new parish properly assumes the burthens before incumbent on either of the constituent old parishes; that is very different from selecting one portion as liable to a burthen previously incumbent on the whole." It was to avoid this unfairness that *Reg.* v. *Tipton* (2) and *Reg.* v. *Hunnington* (3) were decided. And though no such limiting words are used in the judgments, the effect of these two cases may have been only to decide that the settlements were not, at the time of the orders of removal, available. Now the effect of the Union Chargeability Act (28 & 29 Vict. c. 79), following upon 24 & 25 Vict. c. 55, s. 9, is to prevent all unfairness to any part of the subdivided parish, because the burthen falls on the whole union. If 28 & 29 Vict. c. 79 had been passed before *Reg.* v. *Tipton* (2), that case could not have been so decided. The reason for following *Reg.* v. *Tipton* (2) and *Reg.* v. *Hunnington* (3) no longer exists. The words "settled in any parish" in s. 2 must have an extended application to suit the spirit of the statute. As to s. 13, no alteration is made by this construction in the principle of the law, but only in its machinery.

Field, Q.C., was not heard in reply.

COCKBURN, C.J. The only satisfaction I have in deciding this case in favour of the appellants is, that, if we are wrong, the mistake has originated with our predecessors. I never met with a case in which the previous decisions were based on so faulty a principle. I cannot think that when a large parish consisting of several townships is, under 13 & 14 Car. 2, c. 12, s. 21, split

(1) 9 Q. B. 241. (2) 3 Q. B. 215.
(3) 5 Q. B. 273.

up into several places, each supporting its own poor with overseers appointed, it was ever intended to abridge the effect of 43 Eliz. c. 2. The cases, however, which have been cited are all in point. The cases from *Reg.* v. *Oldbury* (1) downwards shew that when a large parish is subdivided, the effect was to render the original parish the same as if it was originally extraparochial. Although these previous cases may have been wrongly decided, yet we must not overrule them—more especially as, in the present case, our decision is not productive of any hardship as regards the pauper.

BLACKBURN, J. I am of the same opinion. The case is governed by a long series of decisions from *Reg.* v. *Tipton* (2) to *Reg.* v. *St. Martin, New Sarum* (3). Looking at the reasons for those decisions, I think that they are founded on a mistake; but we ought not lightly to overrule them. Where it is quite clear that there is a mistake, we are not bound to follow a previous case; but we may act here on the maxim, "Communis error facit jus;" and I do so without much reluctance as no hardship will result to the pauper.

MELLOR and LUSH, JJ., concurred.

Judgment for the appellants.

Attorneys for appellants: *Gregory, Rowcliffes, & Rawle.*
Attorneys for respondents: *Tucker & Lake.*

(1) 4 A. & E. 167. (2) 3 Q. B. 215 (3) 9 Q. B. 241.

1871
June 13, 14.

[IN THE EXCHEQUER CHAMBER.]

THE WILTSHIRE IRON COMPANY, LIMITED *v.* THE GREAT WESTERN RAILWAY COMPANY.

Company—Effect of winding-up of Company—General Lien determined—Companies Act, 1862 (25 & 26 *Vict. c.* 89).

In 1864 an agreement was entered into between the plaintiffs, a joint-stock company, limited, and the defendants, a railway company, by which goods consigned to the plaintiffs were carried by the defendants on a credit account; one condition being that the goods or waggons belonging to or sent by the plaintiffs should be subject to a general lien in favour of the defendants for all moneys due to them from the plaintiffs, to take effect at the option of the defendants at any time after the failure of payment of any sums appearing due on the credit account, or in case of bankruptcy, insolvency, or stoppage of payment.

Coke had been carried for some time by the defendants for the plaintiffs under this agreement, and on the 19th of November, 1866, there was 2000*l.* due from the plaintiffs to the defendants on the account, for carriage. On the 30th of October, 1866, a petition for winding up the plaintiffs' company was presented by a creditor, and notice was given in the *London Gazette*, and on the 16th of November an order for winding up was made under the Companies Act, 1862. On the 19th of November an official liquidator was appointed; but the formal appointment was not made till the 30th of November. The plaintiffs' business was still carried on under the liquidator; and on the 20th of November, coke, consigned to the plaintiffs' company, was put in trucks belonging to the plaintiffs on the defendants' line, and they detained them at the place of loading, for three days, in exercise of their general lien; but, on the liquidator informing them of the order for winding up, they forwarded the trucks at once. An action having been brought by the liquidator in the name of the company for this detention:—

Held, affirming the judgment of the Queen's Bench, that the action was maintainable.

ERROR by the defendants on a judgment of the Court of Queen's Bench in favour of the plaintiffs, on a special case.

The case is set out at length in the report in the court below, ante, p. 101.

J. Digby (*Lopes, Q.C.*, with him), for the defendants. The status of the company was not changed by the winding-up order; and the contract entered into by the company was not extinguished; and consequently the general lien of the defendants still remained, and they were therefore justified in detaining the coke. Under s. 95 of 25 & 26 Vict. c. 89, the liquidator must bring the action in the name of the company, and the declaration alleges that the goods

1871

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

were the goods of the company; and the defendants had clearly a right to detain the company's goods for the debt due on the carriage of other goods belonging to the company.

[WILLES, J. A general lien is very commonly stipulated for by carriers when they carry on credit; but in order that that right of lien may attach to goods, a new act must be done, viz., the delivery of the goods by the same party to the carrier; the general lien in the present case would attach on all goods delivered to the defendants which the Wiltshire Iron Company had power to deal with; but if they lose the power of dealing with the goods, they lose the power to do the act which causes the lien to attach. That I understand to be the judgment of the Queen's Bench.

KELLY, C.B. Virtually, these goods never were the goods of the company. It would be contrary to the whole spirit and policy of the statute to say that these goods were the property of the company, so as to allow a lien to attach to them by virtue of an agreement, made long before the winding-up while they were a solvent company.]

The goods were delivered to the defendants under this very agreement. Moreover, it is not shewn that the defendants had any notice of the winding-up when they received the goods, nor until the 24th of November, and then they forwarded them immediately. The official liquidator was not then appointed; his appointment was not till the 30th of November.

[BYLES, J. Between the 16th and 30th of November, during which period the detention by the defendants took place, by s. 92, the goods of the company were to be deemed to be in the custody of the Court.]

Conceding that, still the defendants had a right to detain the goods, for they were delivered to the defendants under consignment notes, at reduced rates, which expressly gave the defendants this general lien; these notes the official liquidator received, and his title and the title of the company, as between them and the defendants, were as consignees under these notes. By assenting to this delivery, the liquidator has elected to act under the agreement: *Ward* v. *Day*. (1)

(1) 4 B. & S. 337; 33 L. J. (Q.B.) 3.

1871

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

[WILLES, J. Supposing a special agreement by the liquidator that the goods should be liable to this general lien for past carriage, that would be void as a breach of trust. There is yet another difficulty in the defendants' way; they set up a right of lien, but the detention complained of is at the place of loading, before they had carried the goods. They ought to have sent them on at once; this is a refusal to carry; they claim to keep the goods at the beginning of the journey.]

The cause of action is the detention of the plaintiffs' goods. But it is now set up that these are not the plaintiffs' goods, but that the property in the goods is in the liquidator. But there is nothing in the Act giving the winding-up order such an effect. The case is not within ss. 87, 153, 163, 164 of 25 & 26 Vict. c. 89. The property remains in the company, and by s. 95 the liquidator must sue in the name of the company; and s. 94, although it gives the custody of the goods to the liquidator, leaves the property in the company.

[MARTIN, B. *Sankey Brook Coal Co.* v. *Marsh* (1) is an authority against that proposition.]

That was a case of set-off.

[MARTIN, B. But it shews that the company before and after the winding-up are not identical.]

But there is nothing to put an end to an existing contract; it is not like a case of bankruptcy. Sect. 79 enumerates the cases in which a company may be wound up, and by that section and s. 82 it is by no means necessary that it should be in a state of insolvency: and yet, if the effect of the winding-up is to put an end to this contract in the present case, the effect must be the same in the case of any solvent company which may choose to present a petition, and so get rid of this general lien. Sect. 84 says the petition shall be the commencement of the winding-up; but s. 111 shews that the company is not dissolved until an order to that effect has been made after the winding-up has been completed. In *Anderson's Case* (2), Wood, V.C., points out the distinction between a winding-up and a bankruptcy: *Ex parte Harding.* (3) *In re Trent and Humber Co.* (4), *Ex parte Clark* (5), and *Kellock's*

(1) Law Rep. 6 Ex. 185.
(2) Law Rep. 3 Eq. 337.
(3) Law Rep. 3 Eq. 341.
(4) Law Rep. 6 Eq. 396.
(5) Law Rep. 7 Eq. 550.

Case (1), all go to shew that a winding-up order leaves the contracts of the company untouched. Even in the case of bankruptcy, a lien may be enforced against the goods of the bankrupt: *Hawthorn* v. *Newcastle, &c., Ry. Co.* (2). Lastly, conceding that the company carried on business in London within the meaning of rule 2 of the orders under the Companies Act, 1862 (3), and that there has been a proper advertisement of the petition for winding up in the *Gazette*, still that notice is no notice of a winding-up; and under circumstances like the present the Court of Chancery refused to deprive the creditors of their rights: *In re Bastow.* (4) It was incumbent upon the plaintiffs, if they sought to deprive the defendants of the benefit of an agreement which had lasted so long for the benefit of the plaintiffs, to have given the defendants notice upon the delivery of these goods, that the company was being wound up—as the liquidator afterwards did on the 24th—in which case the goods would not have been detained but have been forwarded at once; and the plaintiffs ought not now to turn round and complain of the delay which was caused by their own act in not giving the defendants notice.

Bere, Q.C., for the plaintiffs, was not called upon.

KELLY, C.B. We are all of opinion that the judgment of the Court of Queen's Bench must be affirmed. It is perfectly clear that it would be contrary to the policy of the Act, if not contrary to its express provisions, to hold that the right of possession, and, for the purposes of this action, the right of property, in these goods did not vest by relation in the liquidator as soon as he was appointed, so as to entitle him to maintain the action for damages for the unlawful detention of the goods; and it is equally clear, under the provisions of the Act, that the liquidator is entitled to bring this action in the name of the company. On these grounds we think the judgment of the Court of Queen's Bench must be affirmed. At the same time, I must add for myself, that I have entertained considerable doubts, looking at the form of the action, whether it is maintainable for the detention of these goods: inasmuch as there had been no notice until the 24th of November

(1) Law Rep. 3 Ch. Ap. 769.
(2) 3 Q. B. 734, n.
(3) See 32 L. J. (Ch.) 2.
(4) Law Rep. 4 Eq. 681.

1871

WILTSHIRE IRON CO. v. GREAT WESTERN RAILWAY CO.

that a liquidation order had been granted, or that any one besides the plaintiffs' company were entitled to, or were the real owners, of the goods; and on the 24th of November, when the notice reached the defendants, they forwarded the goods to the Seend station at once, so that the goods were forthwith delivered to the plaintiffs. But the doubt that has crossed my mind more than once in the course of the argument not being shared by any of my learned Brothers, I do not think I should be justified in dissenting from the judgment which they are prepared to pronounce. The judgment will therefore be affirmed.

MARTIN, B. I agree in the judgment pronounced by the Lord Chief Baron; but I desire to add that I think the defendants wholly misunderstood what a lien is. A lien is a right to hold goods which have been carried in respect of the carriage of the particular parcel of goods. Or, by agreement, it may be a right to hold goods in respect of a debt of the same character contracted in respect of other goods. The duty of the defendants was to carry the goods, and deliver or suffer them to be delivered; or they may say, after they have carried them, "We will hold these goods by virtue of our lien;" but to stop them at the commencement of the journey, and hold them for a debt, is entirely contrary to the nature of a lien.

WILLES, J. I entirely agree in that.

CHANNELL, B., and BYLES and KEATING, JJ., concurred.

Judgment affirmed.

Attorney for plaintiffs: *Pulbrook.*
Attorneys for defendants: *Young, Maples, & Co.*

THE QUEEN *v.* THE JUSTICES OF MIDDLESEX

1871
June 10.

Beerhouse—Licence—Certificate—Special Sessions—9 Geo. 4, c. 61, s. 14—32 & 33 Vict. c. 27.

The tenant of a beerhouse, holding a beerhouse licence under 32 & 33 Vict. c. 27, assigned his interest in the premises to another, and gave up possession to him on the 14th of February. At the general licensing sessions, on the 6th of March, the old tenant applied for a certificate for a renewal of the licence, and was refused on the ground that he had been convicted of an offence under 32 & 33 Vict. c. 27, s. 8. The new tenant had not time after the transfer to him to give the requisite notices to enable him to apply at the general licensing sessions:—

Held, that he wes entitled to apply at a special sessions, under 9 Geo. 4, c. 61, s. 14.

RULE to shew cause why a writ of mandamus should not issue to the Justices of Middlesex, commanding them to enter continuances from session to session to the next general quarter sessions for the county, upon the appeal of Joseph Parsons, against the refusal of two justices to grant him a certificate for a beerhouse licence, and to hear and determine the appeal, or grant the certificate.

James Rose was tenant of the Rose and Crown, No. 114, Drummond Street, Middlesex, and on the 1st of May, 1869, he held a beerhouse licence in respect of it. At the annual general licensing sessions in March, 1870, he obtained a certificate of justices under 32 & 33 Vict. c. 27, and in pursuance of it procured an excise licence, to take effect from the 11th of October, 1870, to the 10th of October, 1871. On the 14th of February, Rose, having transferred his interest to Joseph Parsons, gave up possession of the house to him, Rose agreeing to do whatever he could to have his licence transferred to him. At the annual general licensing sessions, held on the 6th of March, 1871, Rose applied for a renewal of his certificate; but was refused, on the ground that he had, in October, 1870, been convicted of an offence under 32 & 33 Vict. c. 27, s. 8. Rose did not appeal against this refusal. Parsons, having previously given the requisite notices, applied for a certificate at the special sessions held under 9 Geo. 4, c. 61, s. 4, on the 12th of April, 1871. The certificate was refused on the ground that the case of the Rose and Crown had been already decided on Rose's application. Parsons appealed to the Middlesex quarter

1871

THE QUEEN v. JUSTICES OF MIDDLESEX.

sessions; but the quarter sessions refused to hear the appeal upon the same grounds.

Poland shewed cause. (1) By s. 8 of 32 & 33 Vict. c. 27, the provisions of 9 Geo. 4, c. 61, with respect to the granting of licences, are applied to the granting of certificates for beerhouse licences. Under 9 Geo. 4, c. 61, a licence can only be granted at the annual general licensing sessions, except in the cases specially provided for by s. 14. (1) But that section applies only to cases arising after the general licensing sessions in any year. It does not apply where, as here, an application for a certificate has been made, and refused on the merits at the general sessions, so as to enable a

(1) In the Bail Court, before Mellor and Hannen, JJ.

(2) 9 Geo. 4, c. 61, s. 14, enacts that: "If any person duly licensed under this Act shall (before the expiration of such licence) die, or shall be by sickness or other infirmity rendered incapable of keeping an inn, or shall become bankrupt, or shall take the benefit of any Act for the relief of insolvent debtors; *or if any person so licensed, or the heirs, executors, administrators or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence*; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence . . . .; or if any house being kept as an inn by any person duly licensed shall be, or be about to be, pulled down or occupied under the provisions of any Act for the improvement of the highways, or for any other public purpose; or shall be by fire, tempest, or other unforeseen and unavoidable calamity, rendered unfit for the reception of travellers, and for the other legal purposes of an inn; it shall be lawful for the justices assembled at a special session, holden under the authority of the Act for the division or place in which the house so kept, or having been kept, shall be situate, in any one of the above mentioned cases, and in such cases only, to grant to the heirs, executors, or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee or assignees of such bankrupt or insolvent, *or to any new tenant, or occupier of any house so become unoccupied*, or to any person to whom such heirs, executors, administrators, or assigns shall, by sale or otherwise, have bonâ fide conveyed or otherwise made over his or their interest in the occupation and keeping of such house, a licence . . . ; or to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down or occupied for the improvement of the highways, or for any other public purpose, or have become unfit for the reception of travellers, or for the other legal purposes of an inn, and who shall open and keep some other fit and convenient house, a licence . . . ; Provided always, that every such licence shall continue in force only from the day on which it shall be granted until the 5th day of April or the 10th day of October then next ensuing, as the case may be."

second application to be made later in the year. The proviso shews that such is the intention of the section. The only words in the section which could apply, are "if any person so licensed shall remove from or yield up possession of the house, &c.," it shall be lawful to grant a licence "to any new tenant, or occupier of any house so become unoccupied." But these words apply only where the tenant leaves the premises vacant, or yields them up to his landlord. They do not apply to a mere transfer by one tenant to another. In the latter case, if the house is duly licensed, a transfer of the licence under s. 4, of 9 Geo. 4 c. 61, is the proper course. Sect. 19 of 32 & 33 Vict. c. 27 (1) does not apply. It limits the grounds on which a certificate may be refused in the case of a house licensed before the 1st of May, 1869. But if the certificate has once been withheld on any of the specified grounds, the application for a fresh licence must be to the general sessions, except in the cases governed by 9 Geo. 4, c. 61, s. 14. Parsons, if he could not apply to the general sessions, ought to have applied at an adjournment of those sessions.

Macmahon, in support of the rule. Sect. 19 of 32 & 33 Vict. c. 27 applies to this case; and under it the justices were bound to grant a certificate. Before that Act there was no restriction upon obtaining a beerhouse licence on a mere certificate of fitness. And houses already open under the old law were by this section intended to be exempted from the Act, except so far as the contrary is expressed. The section does not merely apply to the first application for a certificate; it applies to old houses licensed before the 1st of May, 1869, in perpetuity. Secondly, this case is within s. 14 of 9 Geo. 4, c. 61. In February, 1870, Rose was duly licensed. While so licensed he yielded up possession of the house to Parsons, who is a new tenant within the meaning of the section.

(1) 32 & 33 Vict, c. 27, s. 19, enacts that: "Where on the 1st day of May, 1869, a licence under any of the said recited Acts is in force with respect to any house or shop, for the sale by retail therein of beer, cider, or wine, to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine, to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine not to be consumed on the premises may be refused in accordance with this Act. . . . ."

1871

THE QUEEN v. JUSTICES OF MIDDLESEX.

Parsons could not have applied at the general licensing sessions, for there was not time to give the twenty-one days' notice required by 32 & 33 Vict. c. 27, s. 7. He was therefore at liberty to apply to the special sessions. *Reg.* v. *West Riding* (1) and *Reg.* v. *Lancashire* (2) were cited.

MELLOR, J. I think Mr. Macmahon's client is a new tenant of a house of which possession has been yielded up within the meaning of 9 Geo. 4, c. 61. s. 14; and that, being unable to apply for a licence at the general sessions, he was not bound to go to an adjourned sessions, but might well apply at the special sessions. I do not think under that section it is necessary that the house should be yielded up to the landlord or become vacant. I think it equally applies where the house is yielded up by one tenant to another. And this seems to be in accordance, not only with the words of the section, but with general principle also. I see nothing unreasonable, in the case of a house already licensed, in limiting objections to those affecting the personal character of the applicant. The case is not free from difficulty; but I think the construction which I have put upon the section is the true one.

HANNEN, J. I am of the same opinion. My chief difficulty arose from the fact of Rose's application. But I am now satisfied that there is nothing in that to affect Parsons. Now Rose being licensed yielded up his house to Parsons; Parsons thereby became the new tenant of a house yielded up within the meaning of 9 Geo. 4, c. 61, s. 14. He could not apply at the general licensing sessions. But it is said he might have done so at an adjournment of those sessions. I do not see, however, why he should be bound to do so; or why he should not take advantage instead of the special provisions of s. 14.

Rule absolute.

Attorney for appellant: *J. P. Murrough.*
Attorney for respondents: *E. W. Scadding.*

(1) Law Rep. 5 Q. B. 33. (2) Ante. p. 97.

THE QUEEN, ON THE MOTION OF THE GUARDIANS OF THE CITY OF LONDON UNION *v.* THE POOR LAW BOARD.

1871
June 12.

Poor Law—Dissolution of Union—Deprivation of Office—Clerk to Guardians—Compensation.

By 30 & 31 Vict. c. 106, s. 20, when any union shall be dissolved, if any person shall by means of such dissolution be deprived of any office or employment, the Poor Law Board may, according to their judgment, award a compensation to be paid to such person.

The clerk to the guardians of a union, who was an attorney, was, by the dissolution of the union, deprived of his office. He had, previously to the dissolution, been employed to conduct proceedings on behalf of the guardians, under the Lands Clauses Act, to obtain compensation in respect of lands within the union taken by a railway, and was to be paid for these services. The Poor Law Board in assessing the compensation to which he was entitled for the loss of his office or employment, took into consideration the profits so made by him, in addition to his salary:—

Held, that the Poor Law Board, in so doing, had not exceeded their jurisdiction.

RULE on behalf of the guardians of the poor of the City of London Union, to shew cause why a writ of certiorari should not issue to remove into this Court an order of the Poor Law Board.

It appeared from the affidavits used on the argument of the rule, that by orders, dated the 10th of September, 1869, the Poor Law Board directed that the East London Union should, on the 30th of September, then instant, be dissolved, and the parishes and places within that union be added to the City of London Union.

At the time of these orders, Mr. Alexander John Baylis was acting as clerk to the guardians of the East London Union, and by reason of the orders was deprived of his office.

Mr. Baylis applied to the Poor Law Board for a compensation for the loss of his office. (1) And by an order dated the 17th of

(1) 30 & 31 Vict. c. 106, s. 20, enacts that "when any union shall be dissolved, if any person shall by means of such dissolution be deprived of any office or employment, the Poor Law Board may, according to their judgment, award a compensation to be paid to such person, either in a sum certain or by way of annuity, and shall direct the same to be paid out of the poor-rate of the parish or parishes for which such person was acting at the time of the dissolution, in such manner and according to such proportions as to the said board shall appear equitable."

32 & 33 Vict. c. 63 (Metropolitan

1871

THE QUEEN v. POOR LAW BOARD.

March, 1871, the Poor Law Board awarded to Mr. Baylis the sum of 405*l.*, to be paid forthwith, and an annuity of 324*l.*, commencing from the 25th of December, 1870; and they ordered the said payments to be paid by the guardians of the City of London Union, the amount to be repaid to them from time to time out of the Metropolitan Common Poor Fund.

The following statement shews the items upon which the compensation was based:—

Professional charges connected with the proceedings against the Metropolitan Railway Company for recovering compensation for property belonging to the guardians, and not covered by his salary	169	19	10
Remuneration allowed during last three years in lieu of fixed increase of salary in respect of settlements and removals . . .	182	7	0
Fees (for three years) on election of guardians	44	1	1
Fees (for three years) as superintendent registrar	158	9	5
Remuneration (for three years) as clerk to the assessment committee	150	0	0
	704	17	4
Annual average	234	19	1
Salary as clerk to the guardians . .	250	0	0
Basis of computation	484	19	1

Amount of compensation ($\frac{4}{6}\frac{0}{0}$ths of above basis) 324*l.*

The proceedings against the Metropolitan Railway Company referred to in the above statement, were proceedings to obtain

---

Poor Amendment Act, 1869), s. 18, enacts that "the compensation payable to any officer of a parish who shall be deprived of his office by reason of the parish being added to, or taken from a union, or the union being dissolved or altered, shall be paid by the guardians of such one of the parishes or unions affected by the addition, alteration, or dissolution, as the Poor Law Board may by order direct, and shall be repaid to such guardians out of the Metropolitan Common Poor Fund."

compensation under the Lands Clauses Act, for property in the East London Union taken by the Metropolitan Railway Company for the purposes of their railway.

The ground upon which the rule was obtained was, that the Poor Law Board had exceeded their jurisdiction in respect of the above-mentioned sum of 169*l.* 19*s.* 10*d.*, and ought not to have given any compensation in respect of it.

Sir R. P. Collier, A.G., and *Lumley*, shewed cause. (1) Under 30 & 31 Vict. c. 106, s. 20, the Poor Law Board are placed in the position of arbitrators, and the Court cannot review their decision in any matter within their jurisdiction. They are not bound to limit themselves to the mere salary of the office, or the profits strictly annexed to it by law. The words are "office or employment." They may consider the goodwill. The true test is the selling value of the office if it could be sold. It will be said that Mr. Baylis, being an attorney, was bound to conduct compensation proceedings without charge under the Consolidated Order of the Poor Law Board, 1866. (2) But that order did not repeal the earlier Consolidated Order, 1847. (3)

Prentice, Q.C., and *Mortimer*, were called upon to support the rule. The compensation proceedings in question fall under the term "legal business," in the Consolidated Order, 1866, art. 3, and are not within any of the exceptions there mentioned. Therefore Mr. Baylis was bound to attend to them without extra charge, and cannot have compensation in respect of them apart from his

(1) In the Bail Court, before Blackburn and ~~Montague Smith~~, JJ.

(2) Consolidated Order, 1866, art. 3: It is the duty of the clerk, "if he be an attorney or solicitor, to perform and execute, without charge for anything beyond disbursements, all legal business connected with the union, or in which the guardians shall be engaged, except prosecutions at the assizes, or quarter or general sessions, or Central Criminal Court, all other proceedings at the quarter or general sessions, actions and other proceedings in the superior courts of law, suits and other proceedings in the superior courts of equity, and parliamentary business."

(3) Consolidated Order, 1847, art. 172: "Provided that the guardians, with the approval of the commissioners, may pay to any officer or person employed by such guardians, a reasonable compensation on account of extraordinary services, or other unforeseen circumstances connected with the duties of such officer or person, or the necessities of the union."

1871

THE QUEEN v. POOR LAW BOARD.

salary. Legal business of this kind is not an extraordinary service or unforeseen circumstance within the Consolidated Order, 1847, art. 172. But supposing Mr. Baylis to have been entitled to charge for such services, they are then in no way incident to his office. He need not have been employed though he held the office, and he might have been employed though he had never held it: *Reg.* v. *Mayor of Manchester* (1) is in point. [They also referred to *Reg.* v. *Mayor of Norwich.* (2)]

BLACKBURN, J. I think there is no ground for saying that the Poor Law Board in this case exceeded their jurisdiction, or even that they exercised their jurisdiction improperly. They exercised in the way in which, I think, I should have done. Sect. 20 of 30 & 31 Vict. c. 106, says, "When any union shall be dissolved, if any person shall by means of such dissolution be deprived of any office or employment, the Poor Law Board may, according to their judgment, award a compensation to be paid to such person." This clearly means a compensation for the deprivation of his office or employment. And the words, "according to their judgment," mean not that they are to be liberal of other people's money, but that they are to exercise a fair and reasonable discretion.

In the present case the Poor Law Board in assessing Mr. Baylis' compensation took into their consideration, in addition to his salary as clerk to the guardians, several other sources of income, as to one of which only is there at present any controversy before us. With regard to these, they took as the basis of their assessment an average of three years' profit. This is not a perfect mode of calculation, but it is a fair rough method. And if there were any special circumstances making it unfair in Mr. Baylis' case, these might have been pointed out to the Poor Law Board. The special matter now in dispute, as to which it is said that the Board have exceeded their jurisdiction, is this. Land in the East London Union having been taken by a railway company, and proceedings having been taken to assess the compensation payable to the union in respect of it, Mr. Baylis was employed to conduct these proceedings on behalf of the union, and was to be paid for his services. Mr. Prentice has referred us to a rule of the Poor Law

(1) 5 Q. B. 402. (2) 3 Q. B. 285.

Board by which a clerk to guardians, if an attorney, is bound without charge to conduct all legal proceedings for the guardians except certain specified matters, among which proceedings to assess compensation are not mentioned. And he argues that Mr. Baylis had no right to the remuneration in respect of which he has received compensation. But a prior rule of the Poor Law Board, still in force, has been cited allowing payment to any officer on account of extraordinary services, with the consent of the commissioners; and this removes the difficulty. The Board know best what payments would be sanctioned; and from their allowing compensation in respect of it, we may assume that this payment would be sanctioned if it has not expressly been so. And if the point arose, the sanction of the commissioners could be obtained.

Then arises the question whether the Poor Law Board, in assessing compensation, are tied down to those things which are strictly legally attached to the office; or whether they may say that the office is worth so much more because of the goodwill annexed to it. The guardians might have taken away this employment; but may not the Poor Law Board look to the probability of its continuance? By analogy to compensations under the Lands Clauses Act, I think the goodwill of the office of clerk to guardians may be taken into account. The same question exactly arose in *Reg.* v. *Mayor of Norwich* (1), decided under a similar clause in another Act. The office in that case was one held only from year to year; but the Lords of the Treasury treated it as a continuing office, and as de facto worth as much as an office for life; and it was held that they were right in so considering it. *Reg.* v. *Mayor of Manchester* (2) does not apply here. The profits there in question were much too remote from the nature of the office.

The result is that this rule must be discharged on the ground that the Poor Law Board did not exceed their jurisdiction in taking into account the item objected to.

MONTAGUE SMITH, J. We can act in these matters only where the jurisdiction, not the quantum of compensation, is in question. I do not say that the language of all the judgments in the cases decided under the Municipal Corporation Acts is reconcilable.

(1) 8 A. & E. 633. (2) 5 Q. B. 402.

1871

THE QUEEN v. POOR LAW BOARD.

But the principle is well illustrated in the case referred to by my Brother Blackburn. As to the particular matter now in dispute, I have come to the conclusion that it was a matter belonging to the goodwill of the office, or arising out of it; and it is kindred to those things which are excepted in the Poor Law Order cited. It was incident not to Mr. Baylis' office as an attorney, but to his office as an attorney and clerk to the guardians. In my opinion, therefore, the Poor Law Board have not exceeded their jurisdiction.

Rule discharged.

Attorneys for Guardians of the City of London Union: *Farrar & Farrar.*

Attorneys for Poor Law Board: *Parkers, Pritchard, & Sharpe.*

June 22.

PETTY *v.* COOKE.

Principal and Surety—Discharge of Surety—Payment by Principal avoided as a Fraudulent Preference no discharge of Surety — Equitable Replication.

The payee of a promissory note made by principal and surety accepted the amount thereof from the principal, in good faith, and without notice that the payment was a fraudulent preference. The principal afterwards entered into a composition deed for the benefit of his creditors: the trustees under the deed avoided the payment, as a fraudulent preference, and the payee handed over the amount to the trustees. In an action by the payee against the surety:—

Held, that the payment did not operate as a satisfaction of the debt; and that the acceptance of the money from the principal by the payee was not an act done against the faith of the contract with the surety so as to discharge the surety.

DECLARATION by payee against maker of a promissory note for 100*l.*, with interest, payable on demand, and on accounts stated.

Third plea, that the promissory note was made by the defendant and one S. D. Steele jointly, and whereby they jointly and severally promised to pay the moneys therein mentioned, and that the accounts in the said declaration alleged to have been stated were so stated of and concerning the money due upon the promissory note, and that the money found to be due and the moneys due

upon the note are the same, and not different moneys; and that after the note became due, and before action, S. D. Steele satisfied and discharged the plaintiff's claim by payment.

Fifth plea, on equitable grounds, that the promissory note was made by the defendant and one S. D. Steele jointly, and whereby they jointly and severally promised to pay the moneys therein mentioned, and that the accounts alleged to have been stated were so stated of and concerning the moneys due upon the promissory note, and no other money whatsoever; and the money found to be due, and the moneys due upon the note are the same and not different moneys. And that the defendant made the note jointly with S. D. Steele, for the accommodation of S. D. Steele, and as his surety, only to secure a debt due to the plaintiff from S. D. Steele alone, of which the plaintiff, at the time of the making of the note and when he first received the same, had notice; and that except as aforesaid there never was any value or consideration for the making or payment of the note by the defendant. And that after the note became due, and whilst the plaintiff was the holder of the note, S. D. Steele paid to the plaintiff, and the plaintiff then received from S. D. Steele money exceeding the amount due upon the note in payment of the same, and which payment then operated as a full satisfaction and discharge of the plaintiff's claim upon the note, as against the defendant, and of all the moneys, causes, and rights of action against him in respect thereof.

Replication, on equitable grounds, to the 3rd and 5th pleas: that the payments, in the pleas respectively mentioned, were one and the same identical payment, and not other or different payments. And that S. D. Steele, at the time when he made such payment, as in the 3rd and 5th pleas respectively mentioned, was a trader within the meaning of the laws and statutes concerning bankruptcy in insolvent circumstances; but without any knowledge of such circumstances on the part of the plaintiff; and S. D. Steele made the payment to the plaintiff voluntarily and without any pressure or demand on him, S. D. Steele, for payment of the same; and such payment was made by S. D. Steele in contemplation of bankruptcy or of a quasi bankruptcy, by the execution by him, S. D. Steele, of a trust deed for the benefit of his creditors, within

1871

PETTY v. COOKE.

the true intent and meaning, and according to the clauses of the Bankruptcy Act, 1861, relating to trust deeds for the benefit of creditors, and for the purpose of defeating the provisions of the Bankruptcy Act, 1861, and the other statutes concerning bankrupts. And the plaintiff was then wholly ignorant that such payment was so made in such contemplation as aforesaid. And that after the making of such payment by S. D. Steele to the plaintiff, a deed or instrument of assignment was duly made and entered into between the said S. D. Steele, as debtor, and his creditors, and certain persons as trustees on behalf of the creditors of S. D. Steele, being a trust deed for the benefit of the creditors of S. D. Steele, within the true intent and meaning, and according to the clauses of the Bankruptcy Act, 1861, relating to trust deeds for the benefit of creditors, and under which deed or instrument (all things necessary in that behalf, according to the statutes in such case made and provided, having happened and been done) the right to avoid and rescind, as a fraudulent preference, the payment of the note so made by S. D. Steele to the plaintiff, and to recover from the plaintiff, the amount thereof became and was vested in the trustees as aforesaid. And that after the execution and registration of the deed or instrument, and after the right to avoid and rescind the payment by S. D. Steele to the plaintiff, so became vested in the trustees, they did elect to avoid and rescind, and did avoid and rescind, the payment by S. D. Steele to the plaintiff, and called upon and required the plaintiff to pay the money so received by him from S. D. Steele in payment of the note to them. And that afterwards, and in consequence of the election, and so being called upon and required by the trustees to pay the money so received by the plaintiff from S. D. Steele in payment of the note, he paid the same money to the trustees, and within a reasonable time after such payment gave notice thereof to the defendant. And that the payment by S. D. Steele to the plaintiff under the circumstances stated in this replication, and no other, was and is the identical payment mentioned by the defendant in the 3rd and 5th pleas respectively. And that such payment did not operate in satisfaction and discharge of the causes of action in the declaration mentioned, as in the said pleas respectively alleged.

Demurrer, and joinder in demurrer.

1871

PETTY v. COOKE.

Herschell, in support of the demurrer. The replication is no answer to the pleas. The creditor, by accepting payment of his debt from the principal debtor, has discharged the surety. Payment under a fraudulent preference is not void but voidable; when the payment was made it was not a void payment, and there was a time when the surety could have pleaded it as a discharge. There was also an interval of time during which the surety had lost the right to step in and become the creditor of the principal debtor; the surety is prejudiced in having lost that right; the payment by the principal debtor is therefore a good payment so as to discharge the surety. Any contract between the creditor and the principal debtor prejudicial to the rights of a surety discharges the surety.

[BLACKBURN, J. Is there any case which says that an innocent act unconsciously done discharges the surety? In *Hulme* v. *Coles* (1), the Vice-Chancellor says: "The principle of discharging a surety by the giving of time by the creditor is a refinement of a court of equity, and I will not refine upon it." I also think we ought not to refine upon that doctrine.]

The contract of suretyship between the three parties, the principal debtor, the creditor, and the surety, gives certain rights to each, and one of the rights of the surety is to step in and pay off the creditor and take his place; if by an agreement between the principal and the creditor the surety is deprived of this right he is discharged, and it is immaterial whether the act is unconsciously done or not. The facts in *Pritchard* v. *Hitchcock* (2), were similar to the present case, but equitable pleas could not at that time be pleaded, so that the equitable question as to the rights of the surety were not discussed.

Forbes, contrà. The replication is a good answer to the pleas. The surety, at the time of taking upon himself his liability, contracts that the creditor shall receive valid payment of his claim against the principal debtor. If there is no valid payment the contract of the surety remains unfulfilled, and the surety is not discharged. A payment, which, at the time it is made, contains the seeds of avoidance, and it is subsequently avoided, is not a

(1) 2 Sim. 12. (2) 6 M. & G. 151.

1871

PETTY v. COOKE.

valid payment. The creditor did nothing inequitable in receiving payment, and the acceptance of the money was apparently not an act prejudicial to the surety, but for his benefit. In *Newington* v. *Levy* (1), Willes, J., says: "It must often have happened that a voluntary payment, good at the time, as extinguishing the debt, has been rendered void by matters subsequent, as in the event of bankruptcy of the debtor, and an election by his assignees, to treat the payment as a fraudulent preference, and it has never been successfully contended that the debt did not thereby revive." This passage seems to be decisive of the case. Moreover, *Pritchard* v. *Hitchcock* (2), is precisely in point.

Herschell, in reply.

BLACKBURN, J. It seems to me clear, both in equity as well as law, that the plaintiff is entitled to sue the surety, and that there is nothing stated in the pleadings which has discharged the latter from liability. As early as *Rees* v. *Berrington* (3), a case decided in 1795 by Lord Loughborough, it was held, on what certainly seems artificial reasoning, that where time is given by a creditor to a principal debtor without the consent of the surety, the surety is in equity discharged, however short the time may be, on the ground that he is thereby deprived of his right on paying off the creditor to sue the principal debtor. Lord Eldon, also, in *Samuell* v. *Hawarth* (4), cited in the notes to *Rees* v. *Berrington* (5), says, "The rule is that if a creditor without the consent of the surety gives time to the principal debtor, by so doing he discharges the surety, that is, if time is given by virtue of *positive contract*, between the creditor and the principal—not where the creditor is merely inactive. And in the case put the surety is held to be discharged, for this reason, because the creditor by so giving time to the principal has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract. . . . It has been truly stated that the renewal of these bills might have

(1) Law Rep. 5 C. P. at p. 612.
(2) 6 M. & G. 151.
(3) 2 Ves. 540; 2 Wh. & T. L. C. (Eq.) 3rd ed. 887.
(4) 3 Mer. 272.
(5) 2 Wh. & T. L. C. (Eq.) 3rd ed. 895.

been for the benefit of the surety, but the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit. The creditor has no right, it is against the faith of his contract to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." I think it impossible to read the principle laid down by Lord Eldon without thinking that it is based upon highly technical reasoning, however accurate it may be. It is clear that a creditor who gives time to the principal debtor without reserving his right against the surety, and alters the rights of the surety, discharges him; but that time given by a creditor, which in numberless cases does not injure the surety, should discharge him, is to my mind not justice, although established by courts of equity. The ground, however, on which this doctrine is based, is that by giving time to the principal debtor the creditor does an act which is against good faith, and injurious to the surety; that doctrine cannot apply to the present case, for the creditor accepted money which he had no right to refuse, and the acceptance of which he had no means of knowing would injure the surety. He therefore did no act injurious to the surety, and the surety is not discharged. I think *Pritchard* v. *Hitchcock* (1) is in point.

LUSH, J. I am of the same opinion. The rule of law and equity with regard to the rights of a surety is the same. I do not entertain the slightest doubt that the act of the creditor which discharges the surety must be an act involving something inequitable at the time it is done, and which interferes with the rights of a surety: an acceptance of money from the debtor, which the creditor thought at the time he accepted it was a good and valid payment, cannot therefore discharge the surety. The creditor, under present circumstances, could not have refused to accept the money; its acceptance was an advantage, not an injury, to the surety.

HANNEN, J. I am also of the same opinion. Lord Eldon puts it that the surety is discharged when the creditor has done any-

(1) 6 M. & G. 151.

1871

PETTY v. COOKE.

thing which is "against the faith of his contract." How can it be against the faith of his contract for the creditor to do that which it was his duty to do, namely, to receive payment? It turned out afterwards that the payment was not a good payment, and therefore the surety is not discharged.

Judgment for the plaintiff.

Attorneys for plaintiff: *Bell, Brodrick, & Gray.*
Attorneys for defendant: *Edwards, Layton & Jaques.*

END OF TRINITY TERM, 1871.

INDEX.

ABANDONMENT OF GROUND OF APPEAL 132
See APPEAL TO QUARTER SESSIONS.

ACT OF BANKRUPTCY—Fraudulent preference
See FRAUDULENT PREFERENCE. [77

—— Notice of - - - - - 713
See NOTICE OF ACT OF BANRUPTCY.

ACTION—Notice of—Surveyor of highways 724
See NOTICE OF ACTION.

—— Parties to—Administrator de bonis non 338
See ADMINISTRATOR DE BONIS NON.

—— Parties to—Executor - - - 346
See EXECUTOR.

ACTION ON FOREIGN JUDGMENT 139, 155
See FOREIGN JUDGMENT.

ADJOURNED SESSIONS—Costs—Taxation 305
See TAXATION OF COSTS.

ADMIRALTY COURT JURISDICTION—*Prohibition—Jurisdiction of Court of Admiralty to entertain a Suit under* 9 & 10 *Vict. c.* 93—*Injury and Death caused by Collision at Sea*—24 *Vict. c.* 10, *s.* 7—"*Damage done by any Ship.*"] 24 Vict. c. 10, s. 7, enacts "that the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."—*Held*, by Cockburn, C.J., and Hannen, J. (Blackburn, J., doubting), that personal injury occasioned by the collision of two vessels, does not come under the term "damage" as used in the above section: and that the Court of Admiralty has no jurisdiction to entertain a suit, instituted under 9 & 10 Vict. c. 93, for personal injuries resulting in death occasioned by the collision of two vessels.—*The Beta* (Law Rep. 2 P. C. 447) dissented from. SMITH *v.* BROWN - - - - 729

ADMINISTRATOR DE BONIS NON—*Action—Parties—Administrator de bonis non, when to sue on Contracts made with Administrator after Intestate's Death—Amendment.*] A., a coachbuilder, was employed up to his death by the defendant, a jobmaster; A.'s widow took out administration, and during two or three months, until her own death, did substantial repairs to carriages of the defendant on the intestate's premises and with his tools, all the materials employed being the intestate's, except one shaft. On the widow's death A.'s daughter took out administration de bonis non to A.'s estate; and sued the defendant for the price of the work done by the administratrix:—*Held*, that the proper inference was that the first administratrix had carried on the business for the benefit of the estate, that the money recovered would therefore be part of A.'s assets, and consequently the action was rightly brought by the administratrix de bonis non.—The plaintiff having declared as administratrix of A., and alleged the work, materials, &c., to have been done and supplied to the defendant by her as such administratrix:—*Held*, that the declaration might and ought to be amended by stating the plaintiff to be administratrix de bonis non, and the work, &c., to have been done by the first administratrix. MOSELEY *v.* RENDELL - 338

ADMINISTRATOR DE BONIS NON—*continued.*

AGENT—Contract—Personal liability - 311
See CONTRACT BY AGENT. 1.

—— Contract—Statute of Frauds - Ex. Ch. 720
See CONTRACT BY AGENT. 2.

—— Director—Misrepresentation of authority 276
See MISREPRESENTATION OF AUTHORITY.

—— Sale of shares—Custom of Stock Exchange [Ex. Ch. 309
See CUSTOM OF STOCK EXCHANGE.

AGREEMENT NOT TO KILL GAME - 361
See RESERVATION OF GAME TO LANDLORD.

AGREEMENT TO SUBSCRIBE FOR SHARES 297
See SUBSCRIBER.

AMENDMENT—Parties—Administrator de bonis non - - - - - 338
See ADMINISTRATOR DE BONIS NON.

ANIMALS—Cruelty to - - - 206
See PLACE FOR SLAUGHTERING HORSES.

APPEAL TO QUARTER SESSIONS — *Right to abandon one ground and proceed on others—Union Assessment Committee Acts*, 1862 *and* 1864 (25 & 26 *Vict. c.* 103), *s.* 18 (27 & 28 *Vict. c.* 39), *s.* 1.] M. objected before the assessment committee, under 25 & 26 Vict. c. 103, s. 18, to the valuation list of a union, on the grounds that he was overrated, and that A. and B. were underrated. The committee refused to alter M.'s assessment, and made a small addition to A.'s, upon which M. refused to proceed with his objection to B.'s assessment. A rate having been made in accordance with the valuation list, M. appealed against the rate to the quarter sessions on the same grounds, and served A. and B. with notices. On the hearing

APPEAL TO QUARTER SESSIONS—*continued.*

B. objected that M. had not complied with 27 & 28 Vict. c. 39, s. 1, as, by abandoning his objection to B.'s assessment when before the committee, M. had not "failed to obtain relief." M. then offered to abandon the ground of appeal as to B., and claimed to proceed with the rest of the appeal:—*Held*, that M. had a right to do this, and the sessions were bound to hear the appeal as to M.'s overrating and A.'s underrating on the merits. *Reg.* v. *Cambridgeshire Justices* (1 L. M. & P. 47; 19 L. J. (M. C.) 130) questioned. THE QUEEN *v.* THE JUSTICES OF KENT IN THE MATTER OF MERCER'S APPEAL - 132

—— Beerhouse licence—Evidence - - 89
See LICENCE TO BEERHOUSE. 2.

—— Taxation of costs - - - 305
See TAXATION OF COSTS.

APPEAL—Quarter sessions—Practice - 132
See APPEAL TO QUARTER SESSIONS.

—— Reference—Costs - - - 220
See COSTS ON REFERENCE OF APPEAL.

APPLICATION OF BOROUGH FUND—*Municipal Corporation*—5 & 6 *Wm.* 4, *c.* 76, *s.* 92—7 *Wm.* 4 & 1 *Vict. c.* 78, *s.* 44—*Application for Certiorari*—*Practice.*] In the municipal borough of S. was a waterworks company, incorporated by Act of Parliament, which supplied the greater part of the borough with water. By this Act, the company, after a certain time, on the requisition of the town council, were bound to give a constant supply of water, and they were empowered to make regulations to be observed by the consumers, subject to the approval of two justices, any person aggrieved having the right to oppose the regulations before the justices. The town council having required the company to give a constant supply, the company proposed certain regulations, which were opposed before the justices by the corporation on the ground that they imposed too onerous conditions on the consumers; and the justices modified the regulations accordingly. The company also promoted a bill in parliament to obtain further time for the constant supply, which the corporation opposed; and it was ultimately withdrawn. The town council made two orders for the payment out of the borough fund of the expenses of the opposition before the justices and in parliament respectively, which were paid, notwithstanding objection that the orders were ultra vires. There was no surplus from property of the corporation, and borough rates were made. On a rule for a certiorari, under 7 Wm. 4 & 1 Vict. c. 78, s. 44, to bring up these orders for the purpose of quashing them:—*Held*, that assuming the objects for which the expenses were incurred to be for the public benefit of the inhabitants of the borough, yet they were not within the terms of s. 92 of the Municipal Corporation Act (5 & 6 Wm. 4, c. 76), as "expenses necessarily incurred in carrying into effect the provisions of the Act;" and they could not come within the clause which enabled the town council to apply the funds "for the public benefit of the inhabitants of the borough," as there was no surplus.—13 Geo. 2, c. 18, s. 5, only applies to orders, &c., of justices; and there is no general rule of practice which requires application for a certiorari to be made within six months of the making of the order, &c., sought to be quashed. —*Attorney General* v. *Mayor of Wigan* (Kay, 268; 5 De G. M. & G. 52; 23 L. J. (Ch.) 429), commented upon. THE QUEEN *v.* THE MAYOR OF SHEFFIELD - - - - - 652

APPORTIONMENT OF PAVING EXPENSES—*Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *ss.* 69, 120—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *ss.* 64, 65—*Local Government Amendment Act*, 1861 (24 & 25 *Vict. c.* 61), *s.* 16—*Disputing Apportionment*—*Arbitration on Dispute*—*Jurisdiction of Justices*—*Deposit of Plans.*] A local board of health gave notice, under s. 69 of 11 & 12 Vict. c. 63, to the owners of premises fronting two streets to level, pave, &c., and the owners having made default, the board did the work themselves. An apportionment was made by the surveyor of the board, and a notice was served on the appellant, an owner of premises in one of the streets, that his proportion was 20*l.* 2*s.* The appellant did not pay, and a complaint against the appellant was heard before justices, when it was objected by the appellant that the apportionment was bad, on the ground that the expenses of the two streets had been lumped together, and the aggregate amount divided amongst the owners in the two streets; and the justices dismissed the complaint on that ground. The surveyor then made a fresh apportionment, and a notice was served on the appellant that his proportion was 19*l.* 11*s.* He gave notice that he disputed the apportionment, and a summons was taken out before two justices to settle the apportionment under s. 64 of 21 and 22 Vict. c. 98 (which enacts that all questions referable to arbitration under 11 & 12 Vict. c. 63, may, when the amount in dispute is less than 20*l.*, be determined by two justices in a summary manner). It was objected before the justices that the surveyor, having made one apportionment, could not make another apportionment; that plans had not been deposited at the office of the board, before giving the notice to do the work, as required by 24 & 25 Vict. c. 61, s. 16: but only at the office of the surveyor; that the works required by the notice differed from the works shewn on the plans, and that the works done by the board differed from both. These objections the justices overruled; they also refused to go into the question whether the money had been in point of fact expended; and after calculation they made an order that the proportion payable by the appellant was 19*l.* 11*s.*, and they went on to adjudge that the appellant do pay the same, and that in default of payment a distress warrant should issue. On a case under 20 & 21 Vict. c. 43:—*Held*, 1. That the first apportionment was a nullity, and the surveyor, therefore, was not functus officio, and was right in making a fresh apportionment. 2. That the deposit of plans was not a condition precedent to the validity of all subsequent proceedings. 3. That whether the justices were acting as arbitrators as to the apportionment or as justices to enforce the payment, they had no jurisdiction to inquire into the question whether the amount alleged had been actually expended; and that if the appellant was aggrieved by the alleged overcharge, or by the alleged variances, his remedy was by memorial to the secretary of

APPORTIONMENT OF PAVING EXPENSES—*continued.*
state, under s. 120 of 11 & 12 Vict. c. 13, and 21 & 22 Vict. c. 98, s. 65.—*Bayley* v. *Wilkinson* (16 C. B. (N.S.) 161; 33 L. J. (M.C.) 161) followed as an authority on the third point.—*Semble*, that the justices, when acting as arbitrators under s. 64, had no jurisdiction to order payment, &c. Cook *v.* Ipswich Local Board of Health 451

APPORTIONMENT OF EXPENSES—Local board —Proof of notice - - - - 128
See Notice by Local Board.

ARBITRATION—Appeal—Costs - - 220
See Costs on reference of Appeal.

—— Submission - - - - 332
See Submission to Arbitration.

ARBITRATION CLAUSE—Building contract 115
See Building Contract.

ARCHITECT—Certificate — Submission to arbitration - - - - 332
See Submission to Arbitration.

ARREST—Railway company—Liability - 65
See Tortious Act of Servant.

ASSESSMENT OF COMPENSATION - - 37
See Compensation for Churchyard.

ASSIGNMENT BY TRUSTEE—Bankruptcy 77
See Fraudulent Preference.

ASSIGNMENT OF LEASE—Lives - - 469
See Covenant for Title.

AUTHORITY — Agent — Misrepresentation 276
See Misrepresentation of Authority.

—— Broker—Custom of Stock Exchange Ex. Ch. 309
See Custom of Stock Exchange.

—— Railway company—Arrest - - 65
See Tortious Act of Servant.

BANKER—Cheque—Stamp - - - 209
See Stamp.

—— Payment under mistake of fact - 623
See Payment under Mistake of Fact.

BANKER'S CHEQUE—Stamp - - 209
See Stamp.

BANKRUPTCY—Act of—Notice - - 713
See Notice of Act of Bankruptcy.

—— Creditors' deed—Estoppel - Ex. Ch. 474
See Estoppel by Judgment.

—— Fraudulent preference - - - 77
See Fraudulent Preference.

BASTARDY—7 & 8 *Vict. c.* 101, *ss.* 2, 3, 75—*Jurisdiction—Child Born on the High Seas.*] According to the rule that a ship on the high seas is part of the territory of the state to which she belongs, a bastard child of which a woman has been delivered on board an English ship is to be deemed born in England, and the mother is entitled to an order of affiliation against the putative father resident in England under 8 & 9 Vict. c. 101. Marshall *v.* Murgatroyd - 31

BEERHOUSE—Licence—Discretion of justices
See Licence to Beerhouse. 3. [97

—— Licence—Qualification - - 86
See Licence to Beerhouse. 1.

—— Licence—Renewal—Evidence - 89
See Licence to Beerhouse. 2.

BEERHOUSE—*continued.*

—— —Licence—Special session - - 781
See Licence to Beerhouse. 4.

—— Suffering thieves to assemble - - 370
See Knowingly Suffering Thieves to Assemble.

BENEFICIAL OCCUPATION - - - 193
See Occupation for Poor-rates. 2.

BILL OF EXCHANGE—Provisional payment 623
See Payment under Mistake of Fact.

BILL OF LADING—Charterparty—Construction —Lien - - - - 522
See Lien for Dead Freight.

BOARD OF TRADE—Order—Port - - 632
See Port, Limits of.

BOROUGH FUND, APPLICATION OF - 652
See Application of Borough Fund.

BREACH OF CONTRACT—Reduction of damages —Cross action - - - 687
See Cross Action.

BREACH OF COVENANT—Forfeiture—Waiver
See Waiver of Forfeiture. [245

BREACH OF PROMISE—Letters—Inspection 242
See Inspection of Documents.

BRIDGE—Sewer rate—Exemption - 230
See Exemption from Sewer Rate.

BROKER—Contract—Undisclosed principal
See Contract by Agent. 2. [Ex. Ch. 720

—— Sale of shares—Custom of Stock Exchange
See Custom of Stock Exchange. [309

BUILDING CONTRACT—*Construction—Clause as to Penalties for Delay—Clause of Reference to Arbitration—Clause as to order or decision of Clerk of Works—Party taking advantage of his own Wrong.*] Declaration: That by an agreement between plaintiff and defendant plaintiff agreed to build and complete by a day named certain specified works, subject to alterations or additions which might be made, as mentioned in the agreement, and if plaintiff failed to complete by the day named, he should pay to defendant, as liquidated damages, 3*l.* for every day until the completion of the works, and defendant might deduct such sum from any money due from him to plaintiff, or obtain payment of it in any way he might think fit. It was also agreed that the balance of the sum agreed (2340*l.*) should be paid on completion of the works, when the inspector should have given his final certificate of approval; it was also agreed that the decision of the inspector, with respect to the quality and state of works executed, and to the time within which they should have been executed, should be final and without appeal; and that any dispute between plaintiff and defendant as to the value of any alteration or addition, or concerning the true construction of the contract, or any matter relating thereto, the mode of deciding which was not otherwise expressly provided for, should be left to the determination and award of the inspector, who might give a certificate instead of an award. That the plaintiff completed the works and the inspector gave his final certificate, and that certain disputes arose as to what further sum was due to plaintiff beyond the 2340*l.*, and the disputes were referred to the inspector, who cer-

BUILDING CONTRACT—*continued.*
tified that 990*l.* was the balance due to plaintiff. Breach, non-payment of such sum.—Plea: That the disputes above mentioned were as to the value of certain additions, and not as to the time within which the works should have been executed, and that the question as to time was not in dispute before the inspector. That plaintiff did not complete the works on the day named, and was liable to pay to defendant 873*l.*, being liquidated damages at the rate of 3*l.* for every day from the day named to the day of completion; and defendant is entitled to deduct that sum from the 990*l.* Payment of the 117*l.* balance into court.—Replications: 2. That defendant ordered additions and alterations which were so mixed up with the original works that it was impossible for plaintiff to complete them on the day named, nor until the additions and alterations were completed, as defendant well knew when he gave the order. 4. That there is, and always has been, a dispute as to the time in which such works ought to have been and were completed, and as to the right of defendant to be paid the sum of 873*l.* mentioned in the plea, or any part thereof, and such dispute has not been determined by the inspector, as in the agreement provided.—Rejoinder: That by the agreement it was agreed that plaintiff should do no extra works without an order signed by the clerk of works, and countersigned by the bursar; and in the event of any alteration or addition being executed under such order, the plaintiff should execute and complete the works contracted for, with such alterations and additions, in the same manner as if they had been originally comprised in the works of the contract, and the period for completing the entire works should not exceed the period limited for completion of the original works, unless an extension of time be also allowed by order signed and countersigned as aforesaid. That no extension of time was so given.—The plaintiff demurred to the plea and rejoinder, and the defendant demurred to the 4th replication:—*Held*, 1. That the plea was good, and the 4th replication bad: for that the certificate of the inspector was not a condition precedent to the defendant's right to the 3*l.* per day; nor did the clause as to referring the matter to the inspector exclude the right to bring an action, as there were no excluding words in the clause. 2. That the rejoinder was good: for that, having expressly agreed to do the entire works, if extra work were ordered by the clerk and bursar, within the time originally limited, unless they ordered an extension of the time, the plaintiff was bound by their decision, although it might involve an impossibility. Jones *v.* St. John's College, Oxford - - 115

—— Submission to arbitration - - 332
See Submission to Arbitration.

CANAL—Lands lying near - - - 173
See Lands lying near Canal.

—— Lighting and watching rate - - 707
See Property other than Land.

—— Rating - - - - - 669
See Land covered with Water.

CARRIER—Railway company—Passenger's luggage - - - - - 612
See Passenger's Luggage.

CARRIER—*continued.*

—— Tolls—Lien - - 101, Ex. Ch. 776
See Lien for Tolls.

CASE—*Attorney-General* v. *Mayor of Wigan* (Kay, 268; 5 D. M. & G. 52; 23 L. J. (Ch.) 429) commented on - - 652
See Application of Borough Fund.

—— *The Beta* (Law Rep. 2 P. C. 447) dissented from - - - - - 729
See Admiralty Court Jurisdiction.

—— *Brand* v. *Hammersmith Ry. Co.* (Law Rep. 4 H. L. 171) distinguished - 422
See Compensation under Lands Clauses Act. 1.

—— *Davis* v. *Haycock* (Law Rep. 4 Ex. 373) discussed - - - Ex. Ch. 309
See Custom of Stock Exchange.

—— *Ferrar* v. *London Commissioners of Sewers* (Law Rep. 4 Ex. 1) approved - 572
See Compensation under Lands Clauses Act. 2.

—— *Great Western Ry. Co.* v. *Blake* (7 H. & N. 987; 31 L. J. (Ex.) 346) followed [Ex. Ch. 266
See Negligence of Servant. 3.

—— *McLean* v. *Fleming* (Law Rep. 1 H. L., Sc. 128) considered - - Ex. Ch. 522
See Lien for dead Freight.

—— *Mercer* v. *Woodgate* (Law Rep. 5 Q. B. 26) affirmed - - - Ex. Ch. 433
See Way, Dedication of.

—— *Metropolitan Board of Works* v. *Vauxhall Bridge Co.* (7 E. & B. 964; 26 L. J. (Q.B.) 253) discussed - - 230
See Exemption from Sewer Rate.

—— *Reg.* v. *Cambridgeshire* (1 L. M. & P. 47; 19 L. J. (M.C.) 130) - - - 132
See Appeal to Quarter Sessions.

—— *Reg.* v. *Glamorganshire Canal* (3 E. & E. 186; 29 L. J. (M. C.) 238) discussed 173
See Lands lying near Canal.

—— *Reg.* v. *Grand Junction Canal* (7 W. R. 597) discussed - - - - 173
See Lands lying near Canal.

—— *Reg.* v. *Smith* (3 E. & E. 383; 30 L. J. (M.C.) 74) discussed - - 56
See Occupation for Poor-rate. 1.

—— *Ricket* v. *Metropolitan Ry. Co.* (Law Rep. 2 H. L. 175) distinguished - 422
See Compensation under Lands Clauses Act. 1.

—— *Roswell* v. *Prior* (12 Mod. 635) followed 578
See Watercourse.

—— *St. Giles, Camberwell*, v. *Weller* (Law Rep. 6 Q. B. 168, n.) - - - 164
See New Street.

—— *Soady* v. *Wilson* (3 Ad. & E. 248) followed
See Exemption from Sewer Rate. [230

—— *Stapley* v. *London and Brighton Ry. Co.* (Law Rep. 1 Ex. 21) affirmed - Ex. Ch. 481
See Evidence of Negligence. 2.

—— *Wallington* v. *White* (10 C. B. (N.S.) 128; 30 L. J. (M. C.) 209; 13 C. B. (N. S) 865; 32 L. (C.P.) 86) distinguished - 181
See Road, Liability to repair.

CERTIFICATE—Beerhouse—Licence—Discretion of justices - - - - 97
See Licence to Beerhouse. 3.
—— Licence—Beerhouse—Qualification - 86
See Licence to Beerhouse. 1.
—— Beerhouse—Licence—Renewal—Evidence
See Licence to Beerhouse. 2. [89
—— Beerhouse—Special sessions - - 781
See Licence to Beerhouse. 4.
—— Master of ship—Suspension - - 280
See Person in Charge.
CERTIFICATE OF ARCHITECT—Submission to arbitration - - - - 332
See Submission to Arbitration.
CERTIFICATE OF ELECTION COMMISSIONERS — *Parliamentary Elections — Corrupt Practices Prevention Act* (26 & 27 *Vict. c.* 29), *s.* 7—*Power of Commissioners to refuse Certificate to Witness —Review of decision of Commissioners—Mandamus.*] By 26 & 27 Vict. c. 29, s. 7, when any witness shall answer every question relating to corrupt practices at a parliamentary election which he shall be required to answer, and the answer to which may criminate or tend to criminate him, he shall be entitled to receive from the commissioners appointed to investigate corrupt practices, a certificate stating that such witness was, upon his examination, required by the commissioners to answer questions the answers to which criminated or tended to criminate him, and had answered all such questions, and if any proceeding be at any time pending against such witness for corrupt practices, such proceedings, on production of such certificate, shall be stayed:—*Held*, that if a witness has in point of fact answered all such questions, he is entitled to a certificate; and that if the commissioners refuse to grant a certificate to the witness on the ground that they are of opinion that he has not answered the questions, their decision is not final and conclusive, and may be reviewed by mandamus. The Queen *v.* Price [411
CERTIFICATE OF REGISTRATION—Creditor's deed - - - - Ex. Ch. 47
See Escape.
CERTIORARI, CASE REMOVED BY—Costs 438
See Costs under County Court Acts.
CERTIORARI—Practice—Time to apply - 652
See Application of Borough Fund.
CHARACTER, EVIDENCE OF—Appeal to quarter sessions—Beerhouse - - 89
See Licence to Beerhouse. 2.
CHARTERPARTY—Bill of lading—Construction —Lien - - - Ex. Ch. 522
See Lien for Dead Freight.
CHEQUE—Payable on demand—Stamp - 209
See Stamp.
CHILD — Vaccination — Order in absence of child - - - - - 373
See Vaccination.
CHILD BORN ON HIGH SEAS - - 31
See Bastardy.
CHILD UNDER EIGHT YEARS—Workshop 718
See Workshop Regulation Act.
CHURCHYARD—Compensation - - 37
See Compensation for Churchyard.
CLERK OF WORKS—Order—Building contract
See Building Contract. [115
CLERK TO GUARDIANS—Loss of office—Compensation - - - - 785
See Compensation for loss of Office.
COLLISION—Ship—Person in charge - 280
See Person in Charge.
COLONY—Lex loci—Right of action Ex. Ch. 1
See Lex Loci.
COMITAS GENTIUM—Lex loci—Colony Ex. Ch. 1
See Lex Loci.
COMMISSION—Election—Certificate to witness [411
See Certificate of Election Commissioners.
COMMON—Inclosure—Game - - 596
See Reservation of Game to Lord of Manor.
COMMON LAW PROCEDURE ACT, 1854, s.77
See Submission to Arbitration. [332
COMMON SEAL—Effect of affixing—Company.
See Contract by Agent. 1. [361
COMPANIES CLAUSES CONSOLIDATION ACT
See Subscriber. [297
COMPANY — Director — Misrepresentation of authority - - - - 276
See Misrepresentation of Authority.
—— Director—Personal liability on contract 361
See Contract by Agent. 1.
—— Shares—Subscriber - - - 297
See Subscriber.
—— Winding-up—Contract - Ex. Ch. 101, 776
See Lien for Tolls.
COMPENSATION—Assessment—Churchyard 37
See Compensation for Churchyard.
—— Lands Clauses Act, s. 68 - - 572
See Compensation under Lands Clauses Act. 2.
—— Lands Clauses Act—Ferry - - 422
See Compensation under Lands Clauses Act. 1.
—— Loss of office—Clerk to guardians - 785
See Compensation for loss of Office.
COMPENSATION FOR CHURCHYARD—*Compensation for Land taken under Compulsory Powers of Statute—Mode of Assessing Value to Owner of Land, with Restrictive Rights—Churchyard.*] When land subject to restrictions as to its use is taken for a public object under compulsory powers conferred by statute, the amount of compensation to the person interested therein is to be assessed with reference to the value of his interest therein, and not with reference to its value to the persons taking it. — The plaintiff was rector of three parishes in the city of L., in the churchyards of which burials were prohibited by order in council; the defendants were empowered by statute to take compulsorily, upon making compensation, the whole of one and part of the other two churchyards. The land so taken was to be used partly in forming a new street, and partly for the erection of buildings:—*Held*, that the plaintiffs was entitled to compensation only for the loss that he had sustained by being deprived of his

COMPENSATION FOR CHURCHYARD—*cont.*
interest in the churchyards, and not according to the value of which the land would be to the defendants after they had acquired it. Stebbing *v.* the Metropolitan Board of Works - 37

COMPENSATION FOR LOSS OF OFFICE—*Poor Law—Dissolution of Union—Deprivation of Office—Clerk to Guardians—Compensation.*] By 30 & 31 Vict. c. 106, s. 20, when any union shall be dissolved, if any person shall by means of such dissolution be deprived of any office or employment, the Poor Law Board may, according to their judgment, award a compensation to be paid to such person.—The clerk to the guardians of a union, who was an attorney, was, by the dissolution of the union, deprived of his office. He had, previously to the dissolution, been employed to conduct proceedings on behalf of the guardians, under the Lands Clauses Act, to obtain compensation in respect of lands within the union taken by a railway, and was to be paid for these services. The Poor Law Board in assessing the compensation to which he was entitled for the loss of his office or employment, took into consideration the profits so made by him, in addition to his salary.—*Held*, that the Poor Law Board, in so doing, had not exceeded their jurisdiction. The Queen *v.* The Poor Law Board - 785

COMPENSATION UNDER LANDS CLAUSES ACT (8 *Vict. c.* 18, *ss.* 3, 68), *and Railway Clauses Consolidation Act* (8 *Vict. c.* 20, *ss.* 6, 16),—"*Injuriously affected*"—"*Lands*"—*Hereditament—Ferry.*] A railway company were empowered by their Act to construct across a river, a few hundred yards above an ancient ferry, a railway-bridge and a footway for passengers, from whom they were authorized to take toll; the bridge and way were constructed and used accordingly, and the consequence was that the traffic over the ferry was greatly reduced. The railway works in no way obstructed the ferry or the approaches to it on either side. The owner of the ferry claimed compensation under the Lands and Railway Clauses Consolidation Acts:—*Held*, that the ferry, being a franchise, and therefore an hereditament, was "lands" within the definition of s. 3 of the Lands Clauses Consolidation Act, and that it had been "injuriously affected" within the Acts: for that the direct and immediate effect of the construction of the bridge was to divert the traffic and so injure the ferry.—*Ricket* v. *Metropolitan Ry. Co.* (Law Rep. 4 H. L. 175), and *Brand* v. *Hammersmith Ry. Co.* (Law Rep. 4 H. L. 171) distinguished. The Queen *v.* The Cambrian Railway Company - - - - 422

2. —— *Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 68, *Effect of, to give Compensation—Construction of Special Act consolidating Lands Clauses Consolidation Act.*] Where the entire Lands Clauses Consolidation Act, 1845, is incorporated in a special Act, no other enactment is required, beyond s. 68, to confer the right to compensation for lands injuriously affected by the works under the special Act.—*Ferrar* v. *London Commissioners of Sewers* (Law Rep. 4 Ex. 1), on this point, approved.—By the Chelsea Improvement Act, 1845, s. 83, "so much of the Lands Clauses Consolidation Act, 1845, as is applicable, and is not modified by this Act, or as

COMPENSATION UNDER LANDS CLAUSES ACT—*continued.*
is not inconsistent with the provisions hereof, shall apply to the improvements authorized by this Act to be made, and shall be read as forming part of this Act." By s. 104 the commissioners under the Act may alter the level of streets, nothing being said as to compensation. By ss. 124 and 127 the commissioners may remove from houses projections into the streets which were existing at the passing of the Act, and also, on the rebuilding of projecting houses, set them back to the line of the street, with a proviso that the commissioners shall make compensation to the owner, &c., in either case.—The commissioners, by raising the level of a street under s. 104, impeded the access to a house, and so injuriously affected it:—*Held*, that the lessee of the house was entitled to compensation under s. 68 of the Lands Clauses Consolidation Act; and that the fact of compensation being expressly given in cases under ss. 124 and 127 of the local Act was not inconsistent with the intention that it should be given in cases within s. 104 by virtue of the general enactment in s. 68 of the Lands Clauses Consolidation Act. The Queen *v.* The Vestry of St. Luke's, Chelsea - - 572

CONCEALMENT — *Ship and Shipping — Marine Insurance—Material Fact, Concealment of—Degradation of Ship in Lloyd's Register.*] By the rules of Lloyd's register, a ship classed in it A. 1, for seven years, in order to retain that position is required to undergo a half-time survey in the fourth year, the result of which is reported to the committee. If the survey is satisfactory to the committee, the ship retains her class, and the letters "H. T.," with the date of the survey, are placed opposite the entry of her name, &c. If the report is not satisfactory, she is degraded from her class; and if the survey is not had, or is declined by the owner, she is struck out of the register. The time for the half-time survey is not strictly observed. Every subscriber has a copy of the register; and in the case of London subscribers, the books are sent weekly to Liverpool for correction, where they are posted up and returned the next day.—The plaintiff was the owner of the bark *Annie*, which was classed in the register in November, 1865, as A. 1 for seven years. In October, 1869, she was lying for repairs at Liverpool, and Lloyd's surveyor informed the plaintiff by letter that the *Annie* was due for half-time survey, and requested to know when she would be ready for survey; the plaintiff replied that he had decided not to continue the *Annie* in Lloyd's book. On the 28th of October, the plaintiff's agent in London, pursuant to his directions, applied to the defendants to know at what rate they would insure the *Annie* for twelve months; the defendants were subscribers to Lloyd's register, and their underwriter referred to the entry in the register as to the *Annie*, and asked the plaintiff's agent whether that was the ship he wished to insure, to which he replied "Yes." She then stood as A. 1, for seven years from 1865. The underwriter gave the rate of insurance as of a ship classed A. 1, and on the 15th of November the ship was initialed for insurance, and a policy was issued and dated the

CONCEALMENT—*continued.*

1st of December, 1869. On the 16th of November the *Annie* was struck out of Lloyd's register, and notice was given to the plaintiff on the 17th. On the 23rd of November the defendants' copy of the register was returned to them with the entry as to the *Annie* struck through. On the 31st of December she was wrecked and became a total loss. An action having been brought on the policy, the defendants pleaded concealment. At the trial, on the above facts, the judge refused to direct a verdict for the defendants on that plea, but reserved the point: and he left to the jury the questions, '1. "Was the fact that the plaintiffs had resolved not to continue the ship on the register, and had so stated to the surveyor, material?" To which the jury answered "No." 2. "Ought the underwriter, on the 15th of November, to have known that the continuance of the class must depend on whether the ship had been then lately surveyed and passed, or would within a few days be surveyed and passed, or repaired; and if 'yes,' ought the knowledge to have put the underwriter to ask whether she had been surveyed or was about to be surveyed?" To this the jury answered "Yes;" and a verdict was thereupon entered for the plaintiff.—On a rule to enter a verdict for the defendants, and for a new trial:—*Held*, by the whole Court, that the case was rightly left to the jury; and that there had been no misdirection.—By Mellor, Lush, and Hannen, JJ., that the verdict ought not to be disturbed; but by Cockburn, C.J., that the fact that the plaintiff had decided not to continue the *Annie* on the register was a material fact which ought to have been communicated, and that there ought therefore to be a new trial. Gandy *v.* The Adelaide Marine Insurance Company - 746

CONSTRUCTION—Bill of lading—Charterparty—Lien - - - - Ex. Ch. 522
See Lien for Dead Freight.

—— Building contract - - - 115
See Building Contract.

—— Contract—Coprolites - - - 56
See Occupation for Poor-rate.

—— Contract—Lien - - 101, Ex. Ch. 776
See Lien for Tolls.

—— Statute—Compensation - - 572
See Compensation under Lands Clauses Act. 2.

CONTRACT—Agent—Personal liability - 361
See Contract by Agent. 1.

—— Breach—Reduction of damages—Cross Action - - - - 687
See Cross Action.

—— Building contract—Construction - 115
See Building Contract.

—— Charterparty—Bill of lading—Construction [Ex. Ch. 522
See Lien for Dead Freight.

—— Company—Winding up 101, Ex. Ch. 776
See Lien for Tolls.

—— Construction—Coprolites - - 56
See Occupation for Poor-rate. 1.

—— Mistake—Sale of goods - - 597
See Mistake of Buyer.

CONTRACT—*continued.*

—— Railway company—Running powers [Ex. Ch. 266
See Negligence of Servant. 3.

—— Sale of shares—Custom of Stock Exchange [Ex. Ch. 309
See Custom of Stock Exchange.

—— Statute of Frauds—Signature by agent
See Contract by Agent. 2. [Ex. Ch. 720

—— Submission to arbitration - - 332
See Submission to Arbitration.

CONTRACT BY AGENT—*Promissory Note—Personal Liability of Maker, described as "Director of a Company"—Effect of affixing Seal of Company to a Note.*] Four directors of a joint-stock company signed their names to a promissory note, "We the directors of the Isle of Man Slate Company, Limited, do promise to pay J. D. 1600*l.* with interest at 6 per cent. till paid for value received." And at one corner of the note the company's seal was affixed, with "witnessed by L. L.":—*Held*, that the directors were personally liable as makers of the note: for that there was nothing in the note itself to exclude this personal liability, and the fact that the company's seal was affixed was not sufficient to shew that the note was signed on behalf of the company. Dutton *v.* Marsh - - - - - - 361

2. —— *Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 17—*Signature by Agent—Parties to Contract—Broker—Undisclosed Principal.*] One of the parties to a contract cannot sign the name of the other as his agent, so as to bind him within s. 17 of the Statute of Frauds; the signature as agent must be by a third person.—A broker, signing a contract-note as selling as broker for undisclosed principals, cannot sue as principal in the contract.—The plaintiff, a broker, carrying on business as "W. S. & Co.," was authorized by the defendants, Messrs. B. & H., to buy for them in the market 200 tons of hemp. He drew up and forwarded to the defendants a contract-note: "Bought for Messrs. B. & H. of our principals 200 tons of hemp," (signed) "W. S. & Co., Brokers." The plaintiff had, in fact, no principals as sellers in the transaction; but the defendants had no notice of this. The defendants having refused to accept hemp under the contract:—*Held*, that the plaintiff could not maintain an action on the contract, on the grounds, that the contract in writing was with an undisclosed principal as seller, and not with the plaintiff himself as seller; and also, that the plaintiff, if a party to the contract, could not sign as agent for the defendants, so as to bind them within s. 17 of the Statute of Frauds. Sharman *v.* Brandt - - - Ex. Ch. 720

CONTRIBUTORY NEGLIGENCE—Railway company—Passenger - - Ex. Ch. 377
See Evidence of Negligence. 1.

CONVERSION—Measure of damages - 199
See Damages in Trover.

CONVICTION—*Joint Information—Separate Conviction—Separate Penalty—Separate Hearing—Discretion of Justices—1 & 2 Wm. 4, c. 32, s. 3.*] By 1 & 2 Wm. 4, c. 32, s. 3, if any person whatsoever shall kill or take any game, or use any dog, gun, &c., for the purpose of killing or taking any game on a Sunday . . . such person shall, on

CONVICTION—*continued.*

conviction, forfeit for every such offence a penalty not exceeding 5*l.*—At petty sessions an information was laid against two defendants charging that they did use a gun and kill two pheasants contrary to the above statute; each claimed to be tried separately in order to call the other as a witness; the justices refused, and heard the charge against both together, and convicted them, and a conviction was drawn up separately against each defendant imposing a penalty of 3*l.*:—*Held*, that it was in the discretion of the justices whether they would hear the charge separately or not; that, as the penalty was imposed on every person acting in contravention of the statute, each defendant was separately liable to the whole penalty, and that separate convictions were right. The Queen *v.* Littlechild. The Queen *v.* Heslop 293

COPROLITES—Excavation of - - 56
See Occupation for Poor-rate. 1.

COPYHOLDS—Devise - - - 441
See Devise of Copyholds.

CORPORATION, MUNICIPAL—Borough fund 652
See Application of Borough Fund.

CORRUPT PRACTICES PREVENTION ACT 411
See Certificate of Election Commissioners.

COSTS—Appeal—Reference - - - 220
See Costs on Reference of Appeal.

—— Cases removed by certiorari - - 438
See Costs under County Court Acts.

—— Taxation—Appeal to Quarter Sessions 305
See Taxation of Costs.

COSTS ON REFERENCE OF APPEAL—*Appeal—Reference to Arbitration under* 12 & 13 *Vict. c.* 45, *s.* 13—*Power of Quarter Sessions over Costs.*] On a reference to an arbitrator of an appeal at quarter sessions, under 12 & 13 Vict. c. 45, s. 13, no mention being made of costs, the appeal having been regularly adjourned from sessions to sessions, on the award being made, the subsequent sessions have no power to award any costs either of the reference or of the appeal: their duty being simply to enter the award of the arbitrator as the judgment of the Court. The Queen *v.* The Justices of Middlesex. The West London Extension Railway Company *v.* The Assessment Committee of Fulham Union and the Overseers of Fulham - - - - - 220

COSTS UNDER COUNTY COURT ACTS—30 & 31 *Vict. c.* 142, *s.* 5—*Costs—Action commenced in Inferior Court, and removed by Certiorari.*] Sect. 5 of the County Courts Act, 1867, enacts that, "if in any action commenced after the passing of this Act in any of the superior courts of record the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the Court, or a judge at chambers, shall by rule or order allow such costs":—*Held*, that this section applies to an action commenced in an inferior court and removed into a superior court by certiorari on the application of the defendant. Pellas *v.* Breslauer - - - - - - 438

COUNTY COURT—High bailiff, action against 82
See High Bailiff of County Court.

"COVENANT FOR TITLE"—*Assignment of Lease for Lives—Covenant that Lease is subsisting for the Three Lives.*] By deed of July, 1853, after reciting a lease of 10th of March, 1847, from E. F. to defendant, for the lives of A., B., and C., and the survivor of them, defendant conveyed the premises to plaintiff to hold for the lives of A., B., and C., and the survivor of them, and covenanted "that the said lease of the 10th of March, 1847, is a good, valid, and subsisting lease in the law, for the lives of the said A., B., and C., and the survivor of them, and is not forfeited, surrendered, or become void or avoidable." B. having died before July, 1853, plaintiff sued defendant for a breach of the covenant.—*Held*, by Blackburn and Mellor, JJ. (Lush, J., dissenting), that the mention of the three lives was mere matter of description, and that the covenant only amounted to a covenant that the lease was still subsisting and not that the three lives were still in existence. Coates *v.* Collins - - - - 469

"COVENANT TO USE PREMISES AS POST-OFFICE"—*Sale of Excise Licences for Men Servants, &c.*—By a lease in 1852, premises were demised to the postmaster general for 1000 years, at the rent of one shilling, and the postmaster general covenanted that he and his successors would at all times during the term use the premises as a post-office for the district, and would not use the premises for any other purpose.—Ejectment having been brought on a proviso for re-entry for the breach of the above covenant, on the ground that the excise duties and licences for dogs, men servants, horses, &c., had been received and granted on the premises by the post-office clerks:—*Held*, that there had been no breach of the covenant. Wadham *v.* The Postmaster-General - - - - - - 644

CREDITORS' DEED—Judgment—Estoppel
See Estoppel by Judgment. [Ex. Ch. 474

—— Sheriff—Escape - - - Ex. Ch. 47
See Escape.

CRIMINAL INFORMATION—Libel—Evidence of publication - - - - 352
See Libel.

CROSS ACTION—*Action—Damages in Reduction of Claims in former Action.*] In an action for damages for the non-performance and improper performance of certain work which the plaintiff had employed the defendant to do, the defence set up was that the defendant had sued the plaintiff for the price of the work alleged to have been improperly done, and the plaintiff had settled by paying the whole amount then sued for; and that, as the plaintiff might have given the non-performance and the defective performance complained of in evidence in reduction of damages, the plaintiff was precluded from bringing a cross action for them:—*Held*, that though the plaintiff might have used the causes of action for which he sued in reduction of the claim in the former action, yet he was not bound to do so, but might maintain a separate action for them. Davis *v.* Hedges 687

CRUELTY TO ANIMALS - - - 206
See Place for Slaughtering Horses.

CUSTOM OF STOCK EXCHANGE—*Sale of Shares on Stock Exchange—Contract between "Ultimate" Buyer and Seller—Contract by Buyer to indemnify Seller against subsequent Calls.*] The defendant, through his brokers, purchased on the Stock Exchange of a jobber 100 shares in a joint-stock company, limited, for 15th of May, 1866. On the name day, 14th of May, the brokers handed a ticket with defendant's name as the buyer to the jobber. This ticket having been, according to the custom of the Stock Exchange, divided, a "split" for fifteen shares came through various hands to the broker of plaintiff, who was the registered holder of fifteen shares, and had, through his broker, sold fifteen shares to another jobber for delivery on the same 15th of May. On the receipt of defendant's name plaintiff executed a transfer of the shares to him, and plaintiff's broker handed the transfer and the certificates of the shares to defendant's brokers, who accepted them on behalf of the defendant, and paid plaintiff's broker the price. Defendant's brokers in handing in his name acted by the express authority of defendant, and in accepting the transfer and paying the price they acted according to the custom of the Stock Exchange, though without any express authority of defendant. The company stopped payment on 10th of May, and on 11th of May a petition was presented, and an order of the Court of Chancery for winding up the company was afterwards made. On 18th of May defendant refused to accept the shares, and plaintiff was afterwards compelled to pay a call as the registered holder of the shares: upon which he brought an action against defendant for not indemnifying him against the calls:—*Held*, that defendant was bound by the acceptance of the transfer by the brokers on his behalf and payment of the price; and that a contract then arose between plaintiff and defendant, by which defendant was bound to indemnify plaintiff.—*Davis v. Haycock* (Law Rep. 4 Ex. 373) discussed. Bowring *v.* Shepherd - - **Ex. Ch. 309**

"DAMAGE" - - - - - - **729**
See Admiralty Court Jurisdiction.

DAMAGES—Evidence in reduction of—Cross action - - - - **687**
See Cross Action.

DAMAGES FOR DETENTION—Ship—Lien **[Ex. Ch. 522**
See Lien for Dead Freight.

DAMAGES IN TROVER—*Measure of Damages—Actual Value at Time of Conversion.*] The plaintiff purchased champagne lying at the defendants' wharf at 14s. per dozen, and resold it at 24s. to the captain of a ship about to leave England. The defendants refused to deliver the wine, and the plaintiff was unable to fulfil his contract, champagne of a similar quality not being procurable in the market. The defendants had no knowledge of the sale, or of the purpose for which the plaintiff required delivery of the champagne. In an action for the conversion:—*Held*, that the plaintiff was entitled, as damages, to the price at which he had sold the champagne. France *v.* Gaudet - - - - - - **199**

DANCING—Licence - - - - **693**
See Music Licence.

DEAD FREIGHT—Lien - - **Ex. Ch. 522**
See Lien for Dead Freight.

DEDICATION—Limited, of way - **Ex. Ch. 433**
See Way, Dedication of.

—— Way—Repair - - - - - **181**
See Road, Liability to Repair.

DEFAULT OF APPEARANCE—Foreign judgment - - - - - **155**
See Foreign Judgment. 2.

DEFICIENCY IN RATES—*Poor-rate—Liability of Railway Company to make good deficiency in Rates—27 & 28 Vict. c. cccxxii. s.* 80.] By a railway Act it was enacted that "while the company are possessed under this Act of any lands assessed, or liable to be assessed, to any poor-rate," and certain other rates, "they shall, from time to time, until the railways or the works thereof are completed and assessed or liable to be assessed, be liable to make good the deficiency in the assessment for such rates by reason of these lands being taken or used for the purposes of the railways or other works by this Act authorized; and the deficiency shall be computed according to the rental at which those lands with any buildings thereon were rated at the time of the passing this Act." . . .—The company were empowered under the Act to make certain railways and works forming one entire system, and they took and used certain land in the parish of W. for making a part of the railways and works. The part of the railways and works in the parish of W. was completed and opened for traffic; but other parts of the entire system were not completed. The assessment of the land with the railway and works to the poor-rates and other rates in the parish of W. was below the assessment of the land with buildings thereon before the Act was passed:—*Held*, that the company were liable to make good the deficiency in the assessment until the entire system of railways was completed. The Queen *v.* The Metropolitan District Ry. Co. **698**

DEMURRAGE—Lien - - **Ex. Ch. 522**
See Lien for Dead Freight.

DELAY—Penalty—Building contract - **115**
See Building Contract.

DETENTION—Damages for—Lien - **Ex. Ch. 522**
See Lien for Dead Freight.

"DEVISE OF COPYHOLDS"—*Effect of Wills Act (7 Wm. 4 & 1 Vict. c. 26), s.* 3.] The effect of s. 3 of the Wills Act (7 Wm. 4 & 1 Vict. c. 26) is to enable a copyholder to devise his estate in every case, dispensing with a surrender to the use of the will, but leaving the estate in the customary heir till the admittance of the devisee.—Where, therefore, a copyholder devised his estate to two trustees, appointing them guardians of his customary heir who was an infant, and the devise was entered on the court rolls, and after proclamations the trustees, who had not disclaimed the devise, did not come in to be admitted, but tendered the infant heir for admittance, and the lord refused to admit him on the ground of the devise:—*Held*, that the lord could not seize quousque for want of a tenant. Garland *v.* Mead - - - - - - - **441**

DIRECTOR—Company—Misrepresentation of authority - - - - 276
See Misrepresentation of Authority.

—— Company—Personal liability in contract 361
See Contract by Agent. 2.

DISCHARGE OF SURETY—*Principal and Surety—Discharge of Surety—Payment by Principal avoided as a Fraudulent Preference no discharge of Surety—Equitable Replication.*] The payee of a promissory note made by principal and surety accepted the amount thereof from the principal, in good faith, and without notice that the payment was a fraudulent preference. The principal afterwards entered into a composition deed for the benefit of his creditors: the trustees under the deed avoided the payment, as a fraudulent preference, and the payee handed over the amount to the trustees. In an action by the payee against the surety:—*Held*, that the payment did not operate as a satisfaction of the debt; and that the acceptance of the money by the payee was not an act done against the faith of the contract with the surety so as to discharge the surety. Petty *v.* Cooke - - - - - - 790

DISCRETION OF JUSTICES—Separate hearing
See Conviction. [293

—— Beerhouse—Licence - - - 97
See Licence to Beerhouse. 3.

DISSOLUTION OF UNION—Compensation 785
See Compensation for loss of Office.

DOG-RACE—Game of chance - - 130
See Vagrant Acts. 1.

DRAINAGE RATE—Preliminary expenses 738
See Land Drainage Act, 1861.

EASEMENT—Prescription - - - 578
See Watercourse.

EJECTMENT—Forfeiture—Waiver - - 245
See Waiver of Forfeiture.

ELECTION COMMISSIONERS—Certificate to witness - - - - - 411
See Certificate of Election Commissioner.

EMBANKMENT—Sewer—Rating - - 193
See Occupation for Poor-rate. 2.

ENGLISH LAW—Mistake of - - 139
See Foreign Judgment. 1.

ENJOYMENT AS OF RIGHT—Easement - 578
See Watercourse.

ERROR—Pleading—Judgment - Ex. Ch. 47
See Escape.

ESCAPE—*Error—Pleading—Demurrer and Issue in Fact on the same Pleadings—Plaintiff succeeding on Demurrer, but Defendant on Issue shewing a Defence to whole Action, Defendant is entitled to Judgment.*] Declaration that plaintiff obtained judgment and issued execution against B., and defendant as sheriff arrested B., but allowed him to escape. Pleas: 1. Not guilty. 2. That B. produced to defendant's officer the certificate of the registration of a deed between B. and his creditors, within the meaning of s. 198 of the Bankruptcy Act, 1861, whereupon the officer discharged B., in pursuance of the statute. Issue joined on the pleas; demurrer to the second plea; and replication that plaintiff's cause of action against

ESCAPE—*continued.*

B., in respect of which judgment was recovered, first accrued after the making and registration of the deed, and plaintiff was not one of the creditors bound by the deed. Issue joined on the replication and demurrer. Judgment on the demurrers, that the second plea is bad in substance, and the replication good. Verdict afterwards found for plaintiff on not guilty, the jury assessing the damages at 23*l.*; and for the defendant on the other issues. Judgment that plaintiff take nothing by his writ, and the defendant go without day and that defendant do recover the excess of his costs over those of plaintiff. Error having been brought on this record:—*Held*, by the whole Court, that defendant was entitled on the whole record to the judgment.—By Kelly, C.B., Martin, B., and Brett, J., that the judgment on the demurrers to the second plea and replication ought to be for the defendant; but that the replication, even if it were good in law, not having been sustained in fact, the defendant was entitled on the whole record to judgment.—By Channell and Cleasby, BB., Keating and Montague Smith, JJ., that judgment on the demurrers ought to be for the defendant on the second plea, and for the plaintiff on the replication; and that the issue on the replication having been found for the defendant, he was entitled to judgment. Dignam *v.* Baily - - - - - Ex. Ch. 47

ESTOPPEL—Foreign judgment - - 139
See Foreign Judgment. 1.

—— Judgment—Creditors' deed - Ex. Ch. 474
See Estoppel by Judgment.

ESTOPPEL BY JUDGMENT — *Debtor and Creditor—Right of Creditor to Composition after disputing validity of Composition Deed—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192, 198.] W. A. White entered into a composition deed, by which it was agreed that the creditors should accept a composition of 10*s.* in the pound, secured by the joint and several promissory notes of White and the defendant; the notes to be delivered to trustees for the creditors seven days after the registration of the deed; the whole of White's estate to belong to the defendant, and to be realized for his benefit. The plaintiff agreed to assent to the deed, and afterwards refused to be bound by it, on the ground that his assent had been obtained by fraud. The deed was duly registered according to the Bankruptcy Act, 1861; and the promissory notes were delivered to the trustees, and tendered by them to the plaintiff, but he refused to accept them. The plaintiff then brought an action for his debt against White; and he pleaded the composition-deed, which was a valid deed on the face of it, and the plaintiff replied that the assents were obtained by fraud. The action was referred, and White being unable to prove the sufficiency of the assenting creditors, so as to satisfy the statute, consented that an award should be made by which a verdict should be entered in the plaintiff's favour. White was afterwards adjudged bankrupt. The defendant had realized White's estate. The plaintiff then brought an action against the defendant for the amount of the promissory notes given by the defendant for the composition due to the plaintiff under the deed, and also in detinue to recover

ESTOPPEL BY JUDGMENT—*continued.*
possession of the notes:—*Held* (reversing the judgment of the Queen's Bench), that the plaintiff was not entitled to maintain the action. Latter *v.* White - - - - **Ex. Ch. 474**

EVIDENCE—Appeal to Quarter Sessions—Beerhouse - - - - **89**
See Licence to Beerhouse. 2.

—— Letters—Inspection - - - **242**
See Inspection of Documents.

—— Libel—Publication - - - **352**
See Libel.

EVIDENCE OF NEGLIGENCE—*Railway Company—Negligence — Contributory Negligence — Invitation to alight.*] In an action against the defendants by the executrix of B. to recover damages for his death, alleged to have been caused by the defendants' negligence, the following evidence was given on behalf of the plaintiff:—B. was a passenger by the defendants' railway from London to Highbury. He was a season-ticket holder, and travelled to and fro every day; he was very short-sighted. The train consisted of six carriages; B. rode in the middle compartment of the last carriage. On approaching Highbury Station from London the railway passes through a tunnel. At the farther end of the station is a broad platform, far exceeding the length of the train; then a narrow platform, about 12 feet of which is within the tunnel; then a slope of 10 feet from the platform to the level of the rails; and beyond this a heap of hard rubbish extending some way into the tunnel, about a foot lower than the platform. The train stopped at the station, the last two carriages being still in the tunnel, and the carriage in which B. rode being opposite the heap. A passenger who rode in the next carriage, as the train stopped, heard "Highbury" called out at the far end of the platform; he got out, and then heard a groan in the tunnel; and on going back he found B. lying on the heap with his legs between the wheels of the carriage, but they had not passed over him. The passenger also heard "Keep your seats" called out, and the train then moved farther forward towards the platform. One of B.'s legs was broken, and he had received internal injuries of which he died. It was after dark; there was a lamp within the tunnel near the entrance, about 28 feet from where B. was found; the tunnel was full of steam.—The judge nonsuited the plaintiff, giving her leave to move to enter a verdict, "if the Court considered there was any evidence of negligence on the part of the defendants which could properly be left to the jury." The Court of Queen's Bench refused a rule. On appeal:—*Held*, by Bramwell, Channell, Pigott, and Cleasby, BB., that there was not evidence on which a jury could properly have found for the plaintiff, and the nonsuit was therefore right.—By the same judges, that the question of whether there was contributory negligence on the part of the deceased was open on the above reservation.—By Kelly, C.B., Willes, and Keating, JJ., contrà on both points.—By the whole Court, that the calling out the name of the station is not in itself an invitation to the passengers to alight; whether it is so or not must depend on the circumstances of each particular case. Bridges *v.* The North London Railway Company - - **Ex. Ch. 377**

EVIDENCE OF NEGLIGENCE—*continued.*
2. —— *Negligence—Railway Company—Level Crossings — Injury to Foot Passenger — Railway Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *s.* 47.] The defendants' railway crossed on a level a public carriageway and footway. There were gates across the carriageway and a swing gate for the use of foot passengers. The gates on the down side of the line being open, the plaintiff entered on the railway at a time when a train on the up side was passing, intending to cross as soon as that train had passed; while he was on the railway, another train on the down side, which he could have seen if he had looked, knocked him down and injured him. In an action against the defendants for negligence, the jury found for the plaintiff, and leave was reserved to enter a nonsuit if the Court should be of opinion that there was no evidence of negligence on the part of the defendants:— *Held* (Bramwell, B., dissenting), that there was some evidence of negligence on the part of the defendants to go to a jury, inasmuch as it was the duty of the defendants under 8 Vict. c. 20, s. 47, to keep the gates closed when trains were approaching, and the fact of the gates on the down side being open was an intimation to the plaintiff that the down line was safe.—*Stapley v. London and Brighton Ry. Co.* (Law Rep. 1 Ex. 21) affirmed. Wanless *v.* The North Eastern Railway Company - - - **Ex. Ch. 481**

3. —— *Owner of Real Property — Fall of Brick from a Bridge over a Highway—Railway Company.*] As the plaintiff was passing along a highway under a railway bridge of the defendants, which was a girder bridge resting on a perpendicular brick wall, with pilasters, a brick fell from the top of one of the piers, on which one of the girders rested, and injured plaintiff; a train had passed just previously; on examination afterwards, other bricks were found to have fallen out. The bridge had been built and in use three years. The jury having found a verdict for plaintiff, a rule was obtained, pursuant to leave, to enter a nonsuit, on the ground that there was no evidence of negligence to leave to the jury:—*Held*, affirming the judgment of the Court of Queen's Bench, that the defendants were bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, and that there was evidence from which the jury might infer negligence. Kearney *v.* The London, Brighton, and South Coast Railway Company **Ex. Ch. 759**

EXCLUSIVE OCCUPATION - - - **56**
See Occupation for Poor-rate. 1.

EXECUTION CREDITOR—Notice of Act of Bankruptcy - - - - **713**
See Notice of Act of Bankruptcy.

EXECUTOR—*Action, Parties to—Executors, Action by, for Goods supplied while carrying on Testator's Business.*] The executors of a deceased baker carried on the business for about ten months under directions in the will, and during that time they supplied bread and flour to the defendant, but it did not appear that any of the materials had belonged to the testator:—*Held*, that, as the money when recovered would be assets of the

EXECUTOR—*continued.*
testator, the plaintiffs could sue as executors.—*Bolingbroke* v. *Kerr* (Law Rep. 1 Ex. 222; 35 L. J. (Ex.) 137) discussed. Abbott *v.* Parfitt - 346

EXEMPTION FROM SEWER RATE—*Sewer Rate—Old Exemptions from Sewer Rate—General Benefit derived from Sewer—Rating of Bridge—Metropolitan Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 164—*Metropolitan Sewers Act*, 1848 (11 & 12 *Vict. c.* 112).] The Metropolitan Management Act, 1855 (18 & 19 Vict. c. 120), s. 164, provides that, where any property was, at the time (1848) of issuing the first commission under 11 & 12 Vict. c. 112, entitled to exemption from sewer rate, such exemption shall be allowed in levying any sewer rate under this Act; and s. 76 of 11 & 12 Vict. c. 112, also preserves the old exemptions.—The H. suspension-bridge over the Thames, in a metropolitan district, was built with approaches or roads under an Act of Parliament, and is open to the public on the payment of tolls. The bridge itself drains directly into the river, but the approaches or roads now drain into a sewer made in 1854, but they were sufficiently drained before through a barrel drain (which could still be used), into the river. A sewer rate having been assessed upon the bridge and the approaches, the bridge company appealed, on the ground that the bridge, as distinct from the approaches, was entitled to exemption as deriving no benefit from the sewer: *Held*, by Blackburn and Hannen, JJ., that, though the bridge did not derive any direct or immediate benefit from the sewer, a property such as the bridge and roads did derive "the general benefit and advantage of being accessible and of its approaches and neighbouring public ways being properly drained and cleansed," within the principle of *Soady* v. *Wilson* (3 Ad. & E. 248); and that, consequently, on the authority of that case, the property would not have been exempt from sewer rate before 1848; and that therefore the bridge as well as the roads was liable to the sewer rate.—Cockburn, C.J., dissented, on the ground that no such general benefit could be derived by the bridge from the sewerage of the district.—*Metropolitan Board of Works* v. *Vauxhall Bridge Company* (7 E. & B. 964; 26 L. J. (Q.B.) 253), discussed. The Hammersmith Bridge Company *v.* The Overseers of Hammersmith - 230

EXEMPTION FROM TOLL—*Turnpike—"Usual Place of Religious Worship"—3 Geo. 4, c. 126, s. 32.*] By s. 32 of 3 Geo. 4, c. 126, persons "going to or returning from their usual place of religious worship" are exempted from toll at turnpikes.—A minister of the Primitive Methodists had assigned to him, by persons having authority amongst the Primitive Methodists, the Sunday and other services in a district comprising thirteen parishes, of which the parish of F. was one. The days on which and the places at which he was to attend were fixed at regular quarterly meetings of the Primitive Methodists, and were printed on a "plan." The minister, according to this plan, had to preach at F. on three Sundays in one quarter of a year, and on the other Sundays during the quarter at some of the other parishes in his district:—*Held*, that in going to F. on the Sundays indicated in the plan to conduct the services there, the minister was going to "his usual place of religious worship," and was therefore exempt from liability to pay tolls. Smith *v.* Barnett 34

FERRY—Compensation - - - 422
See Compensation under Lands Clauses Act. 1.

FISHERY—Salmon—Fixed engine - 561
See Salmon Fishery. 2.

—— Salmon—Fixed net - - - 226
See Salmon Fishery. 1.

FILTER BEDS—Rating - - - 639
See Land covered with Water.

"FIXED ENGINE" - - - - 561
See Salmon Fishery. 2.

FIXED NET—Salmon - - - 226
See Salmon Fishery. 1.

FORFEITURE—Waiver of - - - 245
See Waiver of Forfeiture.

FOREIGN JUDGMENT—*Action—How far Foreign Judgment examinable in English Court—Mistake of English Law apparent on Proceedings—Laches of Party in Foreign Court.*] It is no bar to an action, on a judgment in personam of a foreign court having jurisdiction over the parties and cause, that the foreign tribunal has put a construction erroneous, according to English law, on an English contract.—Declaration on a judgment of a French court having jurisdiction in the matter. Plea setting out the judgment, from which it appeared that the suit was for the breach by the shipowner of a charterparty made in England, in which was a clause: "Penalty for the non-performance of this agreement, estimated amount of freight;" and that the court had treated this clause (contrary to the English law), as fixing the amount of damages recoverable, and had given judgment accordingly for the amount of freight. The proceedings shewed that both parties had appeared and been heard before the judgment was pronounced, but no objection was taken by the defendant to the mode of assessing the damages:—*Held*, by Blackburn and Mellor, JJ., that the defendant could not set up, as an excuse for not paying money awarded by a judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to the English law, which was really a question of fact; and that it made no difference that the mistake appeared on the face of the proceedings.—By Hannen, J., that the French court could only be informed of foreign law by evidence; and the defendant, having neglected to bring the English law to the knowledge of the French court, could not impeach the judgment given against him on the ground of error as to that law. Godard *v.* Gray - - - - - - 139

2. —— *Action—Judgment for default of Appearance against a Defendant not Resident nor a Subject of the Country.*] A judgment of a foreign court, obtained in default of appearance against a defendant, cannot be enforced in an English court, where the defendant, at the time the suit commenced, was not a subject of nor resident in the country in which the judgment was obtained: for there existed nothing imposing on the defendant

FOREIGN JUDGMENT—*continued.*
any duty to obey the judgment. Schibsby *v.* Westenholz - - - - - 155

FRANCHISE—Ferry—Compensation - 422
See Compensation under Lands Clauses Act. 1.

FRAUDULENT PREFERENCE—*Bankrupt—Assignment of the whole of a Trader's Property—Pressure.*] R., a trader, under pressure assigned all his property to the plaintiff, a creditor, without fraud and without intention to prefer. R. was at the time insolvent, and was a few days afterwards adjudged a bankrupt on his own petition:—*Held*, that, though the assignment would have amounted to an act of bankruptcy, yet, as it could not be avoided as an act of bankruptcy, it was not fraudulent and voidable by the assignees without fraud in fact. Jones *v.* Harber - - - 77

—— Payment avoided—Surety - - 790
See Discharge of Surety.

FRAUDS, STATUTE OF—Signature by agent
See Contract by Agent. 2. [Ex. Ch. 720

GAME—Reservation to landlord - - 366
See Reservation of Game to Landlord.

—— Reservation to lord of manor - - 590
See Reservation of Game to Lord of Manor.

GAME OF CHANCE—Dog-race - - 130
See Vagrant Acts. 1.

—— Horse-race - - - - 514
See Vagrant Acts. 2.

GENERAL LIEN—Tolls - 101, Ex. Ch. 776
See Lien for Tolls.

GOVERNOR OF COLONY—Colony—Lex loci
See Lex loci. [Ex. Ch. 1

HABITUAL CRIMINALS ACT - - 370
See Knowingly suffering Thieves to assemble.

HACKNEY CARRIAGE—*Railway Station—"Plying for Hire"—The Metropolitan Public Carriage Act*, 1869 (32 & 33 *Vict. c.* 115), *s.* 4.] A carriage, whilst on the premises of a railway company, under a contract with them to await the arrival of their trains, for the conveyance of any passenger by railway who chooses to hire it, is plying for hire within the meaning of the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), s. 4; and is therefore a hackney carriage, and must be licensed. Clarke *v.* Stanford - 357

"HANDICRAFT" - - - - 718
See Worshop Regulation Act.

HEARING OF INFORMATION—Discretion of justices - - - - 293
See Conviction.

HIGH BAILIFF OF COUNY COURT—*County Court—Action against High Bailiff*—9 & 10 *Vict. c.* 95, *s.* 138—*Adjoining District under s.* 138—19 & 20 *Vict. c.* 108, *s.* 21.] By 9 & 10 Vict. c. 95, s. 138, all actions against any person for anything done in pursuance of the statute shall be laid and tried in the county where the fact was committed. By 19 & 20 Vict. c. 108, s. 21, if an action be brought against an officer of a county court, the

HIGH BAILIFF OF COUNTY COURT—*continued.*
summons may issue in the district of which he is an officer, or in any adjoining district, the judge of which is not the judge of a court of which the defendant is an officer:—*Held*, that, assuming s. 138 applied to an action in a county court against a high bailiff for not executing a warrant of another county court, yet the action might be brought under s. 21 in any district adjoining the district of which he is an officer, although in a different county. Partridge *v.* Elkington 82

HIGH SEAS—Child born on - - 31
See Bastardy.

HIGHWAY—Limited dedication of Ex. Ch. 433
See Way, Dedication of.

—— Negligence—Local board of health - 214
See Negligence of Servant. 2.

—— Railway Company—Negligence Ex. Ch. 759
See Evidence of Negligence. 3.

—— Repair - - - - - 181
See Road, Liability to Repair.

"HIGHWAY REPAIRABLE BY THE INHABITANTS AT LARGE" - - 181
See Road, Liability to Repair.

HIGHWAYS, SURVEYOR OF—Notice of action
See Notice of Action. [724

HORSE—Slaughtering—Cruelty to animals 206
See Place for Slaughtering Horses.

HORSE-RACE—Game of chance - - 514
See Vagrant Acts. 2.

INCLOSURE ACT - - - - 590
See Reservation of Game to Lord of Manor.

INCLOSURE OF COMMON—Game - - 590
See Reservation of Game to Lord of Manor.

INDEMNITY, COLONIAL ACT OF - Ex. Ch. 1
See Lex loci.

INFORMATION, JOINT—Separate hearing 293
See Conviction.

INSPECTION OF DOCUMENTS—14 & 15 *Vict. c.* 99, *s.* 6—*Breach of Promise of Marriage—Letters.*] A defendant is entitled to inspect documents in the plaintiff's possession bearing upon the amount of damages, though there be no issue to be tried.—Defendant in an action for breach of promise of marriage applied for leave to inspect letters written by him to plaintiff. Defendant, in his affidavit, admitted the promise to marry, and said he was advised and believed that it was necessary for him on the trial, and to prepare for the trial, to have the letters produced, and that he would derive advantage from the production. Plaintiff, by affidavit, objected to the production of the letters on the ground, amongst others, that defendant might refer to some of the letters in mitigation of damages:—*Held*, that defendant was entitled to inspection. Pape *v.* Lister 242

"INSTRUMENT OF GAMING" - 130, 514
See Vagrant Acts.

INVITATION TO ALIGHT—Railway company—Negligence - - - Ex. Ch. 377
See Evidence of Negligence. 1.

JOINT INFORMATION—Separate hearing 293
See Conviction.

JUDGMENT, FOREIGN—Action - 139, 155
See Foreign Judgment.

JUDGMENT, RIGHT TO—Error - Ex. Ch. 49
See Escape.

JURISDICTION — Admiralty — Lord Campbell's Act - - - - - 729
See Admiralty Court Jurisdiction.
—— Bastardy—Child born on high seas - 31
See Bastardy.
—— Foreign court - - - - 155
See Foreign Judgment. 2.
—— Justices—Costs - - - - 220
See Costs on reference of Appeal.
—— Justices—Master of ship—Suspension of certificate - - - - 280
See Person in Charge.
—— Justices—Order for vaccination - 273
See Vaccination.
—— Justices—Separate hearing - - 293
See Conviction.

JUSTICES—Appeal to Quarter Sessions - 132
See Appeal to Quarter Sessions.
—— Costs—Jurisdiction - - - - 220
See Costs on reference of Appeal.
—— Discretion of—Beerhouse—Licence - 97
See Licence to Beerhouse. 3.
—— Discretion of—Petroleum - - 497
See Petroleum Acts. 1.
—— Jurisdiction—Bastardy - - 31
See Bastardy.
—— Jurisdiction—Master of ship—Suspension of certificate - - - - 280
See Person in Charge.
—— Jurisdiction—Order for vaccination - 373
See Vaccination.
—— Jurisdiction—Separate hearing - 293
See Conviction.

KNOWINGLY SUFFERING THIEVES TO ASSEMBLE—*Beerhouse—Habitual Criminals Act* (32 & 33 *Vict. c.* 99), *s.* 10.] By 32 & 33 Vict. c. 99, s. 10, a penalty is imposed on "every person who occupies or keeps any place where exciseable liquors are sold, and knowingly lodges or harbours thieves or reputed thieves, or knowingly permits or suffers them to meet or assemble therein."—The appellant, who occupied a place where exciseable liquors were sold, allowed a meeting to be held there for the purpose of getting up a subscription in aid of the wife and children of a man charged with an offence, or for procuring means for his defence. At the meeting were several thieves, or reputed thieves, who were known by the appellant to be such; but no disorderly conduct occurred, and the meeting was not held pursuant to any unlawful design:—*Held*, that such an assemblage is forbidden by the section, inasmuch as it affords opportunity and inducement to devise crimes; and that the appellant was guilty of an offence within the meaning of the section. Marshall *v.* Fox. - - - - 370

LACHES—Judgment—Estoppel - - 139
See Foreign Judgment. 1.

LAND COVERED WITH WATER—*Rate—Assessment of Canal—Land occupied by Filter Beds—Land used for purpose of preparing Sand for Filter Beds—Land occupied by Pipes—Sewage Utilization Act*, 1867 (30 & 31 *Vict. c.* 113), *s.* 17.] By 30 & 31 Vict. c. 113, s. 17, the occupier of any land covered with water . . . shall pay to the sewer rate in respect of his property one fourth part only of the rate in the pound payable in respect of houses and other property.—A waterworks company were possessed of a canal, of filter beds supported on brick arches, and sometimes covered with water, at other times not, of land used for keeping sand for the filter beds; and they also occupied land by iron pipes, mains, and service pipes:—*Held*, that the canal and the filter beds were land covered with water within the meaning of s. 17, and ought to be assessed at one fourth of the amount to be imposed on houses; but that the land used for the purpose of keeping sand, and the land occupied by iron pipes, mains, and service pipes, did not come within that description, and ought to be assessed at the full value. The East London Waterworks Co. *v.* The Leyton Sewer Authority. 669

LAND DRAINAGE ACT, 1861—(24 & 25 *Vict. c.* 133), *ss.* 29, 31, 38—*Preliminary Expenses of proposed Works, how defrayed—General Rate on occupiers for Preliminary Expenses—Mode of assessing Land.*] By 24 & 25 Vict. c. 133, s. 29, previously to commencing new works, when they involve an expenditure of more than 1000*l.*, the commissioners of sewers shall cause plans of the proposed works and an estimate of the expense thereof to be made, and shall publish their intention to execute such works two months before commencing the same. By s. 31, if within such period of two months the proprietors of one-half the area of the land to be rated declare their dissent, the commissioners shall take no further steps; but if no such declaration is made the commissioners may commence the work, and repay, out of the rates to be levied by them within the area, all expenses incurred. By s. 38, rates may be levied by the commissioners for defraying all costs incurred by them, and a rate levied for the purpose of defraying the expense of new works involving an expenditure of more than 1000*l.*, shall be deemed to be a special rate, and a tax on the owners of property; but other rates shall be payable by the same persons in respect of the same property as they are now by law payable. By s. 67 all powers by the Act vested in commissioners of sewers may be exercised by a drainage board.—The drainage board for a district incurred expenses in making surveys and plans for certain proposed works. The estimates for the proposed works amounted to more than 1000*l.* The proprietors of one-half of the land dissented from the execution of these works, which were never carried out. The board made a general rate on the occupiers of land in the district, in order to pay for the expenses of the surveys and plans:—*Held*, that the occupiers, and not the owners, were chargeable, under ss. 31 and 38, with these expenses; and that the rate was properly made on the present value of the land. Griffiths *v.* The Longdon and Elderfield Drainage Board. - - - 738

LANDLORD AND TENANT—Covenant to use premises as post-office - - 644
See Covenant to use Premises as Post-office.

—— Forfeiture—Waiver - - - 245
See Waiver of Forfeiture.

—— Reservation of game - - - 366
See Reservation of Game to Landlord.

"LANDS" - - - - - 422
See Compensation under Lands Clauses Act. 1.

LANDS CLAUSES ACT - - 422, 572
See Compensation under Lands Clauses Act.

LANDS INJURIOUSLY AFFECTED—Compensation - - - - - 572
See Compensation under Lands Clauses Act.

LANDS LYING NEAR CANAL — *Poor-rate — Canal—"Lands lying near"—Mode of Assessment under* 34 *Geo.* 3, *c. xxiv. s.* 19.] By 34 Geo. 3, c. xxiv. s. 19, it was provided that a canal company should from time to time be rated to all parliamentary and parochial taxes, in respect of the lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses or other buildings to be erected by the company, in the same proportion as other lands, grounds, and buildings lying near the same, are, or shall be rated, and as the same lands, grounds, and buildings would be rateable in case they were the property of individuals in their natural capacity. —Land was purchased by the company, and the canal was made with towing-paths and lock-houses and buildings attached thereto; subsequently a railway was made on land lying near the canal, running parallel with, and in one place crossing the canal. Buildings were erected on much of the land lying near the canal, and portions of such lands were converted into gardens for watercresses, and otherwise greatly improved in value. In 1848 the company adopted the 8 & 9 Vict. c. 42, and commenced business as carriers on their own account on the canal:—*Held*, 1. That the land occupied by the canal was to be rated in the same proportion as the open land lying near, the value of which might be increased from time to time by circumstances; and the buildings belonging to the company in the same proportion as the buildings lying near. 2. That the land occupied by the canal lying near the railway was not to be rated in proportion to the improved value of land with a railway upon it. 3. That the rateable value of the canal under the private Act was not affected by reason of the company carrying on the business of carriers. *Reg.* v. *Grand Junction Canal* (7 W. R. 597) and *Reg.* v. *Glamorganshire Canal* (3 E. & E. 186; 29 L. J. (M.C.) 238), discussed. The Grand Junction Canal Company *v.* The Overseers of Hemel Hempstead. The Grand Junction Canal Company *v.* The Overseers of King's Langley 173

LEASE—Assignment of—Lives - - 419
See Covenant for Title.

LETTER—Inspection—Breach of promise 242
See Inspection of Documents.

LEVEL CROSSING — Railway company—Negligence - - - Ex. Ch. 481
See Evidence of Negligence. 2.

LEX FORI—Lex loci—Colony - Ex. Ch. 1
See Lex loci.

LEX LOCI—*Action—Lex fori—Comitas gentium extended to Colonies—Right of Action in England for acts in foreign Country—Effect in England of Act of Indemnity by Colony—Governor of Colony can legally give assent to a Legislative enactment in his own favour—Power of Crown to create a local Legislature in a Colony—Duty of Governor in case of Insurrection.*] In bar to an action for assault and false imprisonment of the plaintiff in the island of Jamaica, the defendant pleaded, that since the grievances complained of an Act of Indemnity had been passed by the legislature of Jamaica, and assented to by the Crown, which enacted that all personal actions, suits, indictments, prosecutions, and proceedings, present or future, against any persons for acts done in good faith after the proclamation of martial law in the suppression of a rebellion which had broken out in the island, should be discharged and made void, and that any person by whom such acts had been done should be acquitted and indemnified against the Queen and all other persons; and that the defendant, the governor of the island, and all acting under his authority, were indemnified in respect of all acts done in order to put an end to the rebellion, and such acts were made and declared to be lawful; that the grievances complained of were acts done within the scope of the Act.—The plaintiff replied, that the defendant, at the time of the passing of the Act, was the governor of Jamaica, and was a necessary party to the passing of the Act, and the Act could not have become the law of Jamaica without the defendant's assent as governor. On demurrers to the plea and replication:—*Held:* First, that the Crown had power to create a local legislature in a dependency of the Crown whether conquered, ceded, or settled. Secondly, that the Act of Indemnity was not repugnant to 11 & 12 Wm. 3, c. 12, within the meaning of 28 & 29 Vict. c. 63, so far as the Act of Indemnity related to civil proceedings. Thirdly, that, although the Act of Indemnity was retrospective in its nature, it had effect without the limits of Jamaica so as to prevent an action from being brought in England, and therefore that the plea was good.—*Held*, also, that the governor of a colony could legally give his official assent to a legislative measure in which he is personally interested; and that the replication was therefore bad. Phillips *v.* Eyre [Ex. Ch. 1

LIBEL—*Criminal Information for Libel, Rule for—Evidence of Publication—Affidavit, Sufficiency of.*] A rule nisi for a criminal information for libel having been obtained against J. S., on affidavits which stated that a copy of a newspaper had been purchased from a salesman in the office of the newspaper, and that by a footnote to the newspaper J. S. was stated to be the printer and publisher of the newspaper, and that the deponent believed J. S. to be the printer and publisher, the Court discharged the rule on the ground that the affidavits contained no legal evidence of publication, which was necessary in

LIBEL—*continued.*
order to obtain leave to file a criminal information.—*Quære*, whether a defect in the affidavits, on which the rule nisi for a criminal information has been obtained, can be supplied by a statement in an affidavit of the defendant made in shewing cause against the rule. The Queen *v.* Stanger - - - - - 352

LICENCE—Beerhouse—Discretion of justices 97
See Licence to Beerhouse. 3.

—— Beerhouse—Renewal—Evidence 2. 89
See Licence to Beerhouse.

—— Beerhouse—Qualification - - 86
See Licence to Beerhouse. 1.

—— Beerhouse—Special sessions - - 781
See Licence to Beerhouse.

—— Dancing—Music - - - 693
See Music Licence.

—— Petroleum - - - - 505
See Petroleum Acts. 2.

LICENCE TO BEERHOUSE—*Beerhouse — Certificate for Renewal of Licence—Qualification of House*—3 & 4 *Vict. c.* 61, *s.* 1, 32 & 33 *Vict. c.* 27, *ss.* 8, 9.] By 3 & 4 Vict. c. 61, s. 1, it is enacted that no licence to sell beer by retail shall be granted to any person who shall not be the real resident occupier of a dwelling-house . . . nor shall such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor on a rent or annual value of 15*l.*—By 32 & 33 Vict. c. 27, ss. 8, 9, the justices are not to refuse a certificate except on certain grounds, one of which is that the house or shop wherein beer is to be sold is not duly qualified. The appellant occupied a house and shop, which were together rated in the sum of 15*l.*; the house and shop were attached to and communicated with each other, and the shop was used for the sale of groceries and beer:—*Held*, that the shop was part of the premises occupied with the house within the meaning of s. 1, of 3 & 4 Vict. c. 61, and that in ascertaining the rateable rate of the house the value of the shop might be taken into account. Garetty *v.* Potts [86

2. —— *Beerhouse—Certificate for Renewal of Licence—Practice on Appeal—Hearing of Fresh Evidence as to Character—Wine and Beerhouse Act*, 1869, 32 & 33 *Vict. c.* 27, *s.* 8, *subs.* 1, *s.* 19—9 *Geo.* 4, *c.* 61, *s.* 27.] By 32 & 33 Vict. c. 27, s. 8, all the provisions of 9 Geo. 4, c. 61, as to granting licences and as to appeal shall, so far as may be, have effect as to granting certificates under this Act, subject to this qualification that no certificate in respect of a licence to sell beer, &c., not to be consumed on the premises shall be refused, except on one of the grounds following: 1. That the applicant has failed to produce satisfactory evidence of good character. By s. 19, where, on the 1st of May, 1869, a licence is in force with respect to any house for the sale of beer, &c., to be consumed on the premises, a certificate in respect of such house shall not be refused except on one of the grounds mentioned in s. 8. The 9 Geo. 4, c. 61, s. 27, gives an appeal, in general terms, to any person aggrieved by any act of a justice acting under the statute,—Justices in licensing sessions refused a certificate for the renewal of a licence, under s. 19, on the ground that the applicant had failed to produce satisfactory evidence of good character. The applicant then appealed to quarter sessions:—*Held*, that fresh evidence of character was admissible before the quarter sessions, and if that was satisfactory, the appellant was entitled to a certificate. The Queen *v.* Pilgrim - - - 89

LICENCE TO BEERHOUSE—*continued.*

3. —— *Beerhouse—Certificate for New Licence to sell Beer to be consumed on the Premises—Discretion of Justices in granting New Licence—*32 & 33 *Vict. c.* 27, *ss.* 5, 8, 19—9 *Geo.* 4, *c.* 61, *ss.* 1, 9.] On an application under 32 & 33 Vict. c. 27, for a certificate for a licence to sell beer to be consumed on the premises, in respect of a house not previously licensed, the justices have the same discretion as to granting or refusing the certificate as they have in granting or refusing a licence under 9 Geo. 4, c. 61; and they may and ought to take into consideration the number of houses in the neighbourhood already licensed, and refuse the certificate if they think an additional beerhouse unnecessary or undesirable in the interest of the public. The Queen *v.* The Justices of Lancashire. *In re* Tyson's Appeal - 97

4. —— *Certificate—Special Sessions*—9 *Geo.* 4, *c.* 61, *s.* 14—32 & 33 *Vict. c.* 27.] The tenant of a beerhouse, holding a beerhouse licence under 32 & 33 Vict. c. 27, assigned his interest in the premises to another, and gave up possession to him on the 14th of February. At the general licensing sessions, on the 6th of March, the old tenant applied for a certificate for a removal of the licence, and was refused on the ground that he had been convicted of an offence under 32 & 33 Vict. c. 27, s. 8. The new tenant had not time after the transfer to him to give the requisite notices to enable him to apply at the general licensing sessions:—*Held*, that he was entitled to apply at a special sessions, under 9 Geo. 4, c. 61, s. 14. The Queen *v.* The Justices of Middlesex - - - - - - 781

LIEN—Shipowner—Dead freight - Ex. Ch. 522
See Lien for Dead Freight.

—— Tolls - - - 101, Ex. Ch. 776
See Lien for Tolls.

LIEN FOR DEAD FREIGHT—*Ship and Shipping —Lien of Shipowner under Charterparty and Bill of Lading, for Dead Freight and Demurrage, and Detention at Port of Lading, as against Assignee of Bill of Lading.*] The plaintiff, on the 18th of August, 1866, chartered his vessel *Superior* to R. C., for a voyage from Sulina to London. By the charterparty the ship was to proceed to Sulina, and there load a full cargo of staves $\frac{\text{and}}{\text{or}}$ grain, or other lawful merchandise, which the charterer bound himself to ship, and thence proceed to London, and deliver the same on being paid freight at 8*s.* per 100 oak staves and other merchandise, if shipped, in fair proportion; fifty running days to be allowed for loading and ten days on demurrage over and above the said laying days at 8*l.* per day. The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibility to cease on shipment of the cargo,

LIEN FOR DEAD FREIGHT—*continued.*

provided it be of sufficient value to cover the freight and charges on arrival at port of discharge.—The ship arrived at Sulina, and after considerable delay the loading, as far as it went, was completed on the 5th of January, 1867; and on that day bills of lading were signed by the captain, under protest: "Shipped by R. C. on the ship *Superior*, of whom H. W. is captain, now lying in the port of Sulina, and bound to consign his cargo as per charterparty of 18th of August, 1866, 283,682 oak staves, which are to be delivered at the port of discharge, as per the aforesaid charterparty . . . unto order, or to his or their assigns, he or they paying freight *and all other conditions* or demurrage (if any should be incurred) for the said goods, as per the aforesaid charterparty. (The words "and all other conditions" were added in writing.)—A full and complete cargo was not shipped, and the vessel sailed from Sulina, and performed her voyage with a short cargo. She was also detained at her port of loading during the ten days on demurrage, and also eighteen days beyond the ten days. The cargo was of value sufficient to cover the plaintiff's claims for freight, dead freight, and demurrage. —On the ship's arrival in London, the plaintiff claimed a lien on the cargo for the amount of dead freight, and of demurrage, and for damages for her detention during the eighteen days.—The defendants claimed the cargo as the consignees named in the bills of lading; they had no notice until the arrival of the ship in London of the said claim, but a copy of the charterparty had been sent to the defendants with the original bill of lading.—The Court of Queen's Bench held, on the authority of decided cases, that the plaintiff had a right of lien as against the defendants for the ten days demurrage; but not for dead freight, nor for the damages for detention during the eighteen days.—On error by both parties:—*Held*, by Kelly, C.B., Willes, and Brett, JJ., and Channell, B., that there was no lien given for damages for short loading under the term "dead freight" in the charterparty.—By Bramwell, B. [on the authority of *McLean* v. *Fleming* (Law Rep. 2 H. L., Sc. 128)], and Cleasby, B., that such a lien was given by the charterparty.—*Held*, also, by Kelly, C.B., Bramwell, Channell, and Cleasby, BB., that a lien was given by the charterparty for demurrage proper under the term "demurrage," but not for damages for detention beyond the demurrage days; and that this lien for demurrage at the port of loading was retained by the terms of the bill of lading:—By Willes and Brett, JJ., that, if a lien was given by the charterparty for demurrage and detention at the port of loading, it was not retained against the defendants by the terms of the bill of lading.—The whole Court of Exchequer Chamber were therefore agreed that the judgment of the Queen's Bench for the defendants as to the damages for the detention was right; and the judgment of the Queen's Bench was affirmed on the other two points by a majority of four judges against two. Gray *v.* Carr [Ex. Ch. 522

LIEN FOR TOLLS—*Company—Effect of winding up of Company—General Lien determined—Companies Act*, 1862 (25 & 26 *Vict. c.* 89).] In 1864 an agreement was entered into between the plaintiffs, a joint-stock company, limited, and the defendants, a railway company, by which goods consigned to the plaintiffs were carried by the defendants on a credit account; one condition being that the goods or waggons belonging to or sent by the plaintiffs should be subject to a general lien in favour of the defendants for all moneys due to them from the plaintiffs, to take effect at the option of the defendants at any time after the failure of payment of any sums appearing due on the credit account, or in case of bankruptcy, insolvency, or stoppage of payment.—Coke had been carried for some time by the defendants for the plaintiffs under this agreement, and on the 19th of November, 1866, there was 2000*l.* due from the plaintiffs to the defendants on the account, for carriage. On the 30th of October, 1866, a petition for winding up the plaintiffs' company was presented by a creditor, and notice was given in the *London Gazette*, and on the 16th of November an order for winding up was made under the Companies Act, 1862. On the 19th of November an official liquidator was appointed; but the formal appointment was not made till the 30th of November. The plaintiffs' business was still carried on under the liquidator; and on the 20th of November, coke, consigned to the plaintiffs' company, was put in trucks belonging to the plaintiffs on the defendants' line, and they detained them at the place of loading, for three days, in exercise of their general lien; but, on the liquidator informing them of the order for winding up, they forwarded the trucks at once. An action having been brought by the liquidator in the name of the company for this detention:—*Held*, that the action was maintainable. The Wiltshire Iron Company, Limited *v.* The Great Western Railway Company - - - 101, Ex. Ch. 767

LIGHTING AND WATCHING RATE - 707
See "Property other than Land."

LIMITATIONS, STATUTE OF—(3 & 4 *Wm.* 4, *c.* 27)—*Trustee and Cestui que—Effect of Occupation pursuant to Articles of Agreement for a Lease—Reversioner.*] A. entered into articles of agreement for leases of ninety-nine years from Lady-day, 1768, of certain building land abutting on the Thames with the trustees of D. who were tenants in fee. Soon afterwards by 11 Geo. 3, c. xxxiv., A. and others were empowered to embank the Thames, and win part of the bed of it: and s. 2 enacted that the ground and soil of the river to be enclosed and embanked in the front of each house should vest in the owner of the house according to his respective estate, trust, or interest. A certain portion of the bed of the river, fronting the land on which he had built houses under his leases, was reclaimed by A. pursuant to the statute, and he occupied it more than twenty years before Lady-day, 1867. No lease of the reclaimed land was ever executed either by the trustees or by A. The leases, if they had been granted, would have expired at Lady-day, 1867. No rent was ever paid by A. in respect of the reclaimed land:—*Held*, that by 11 Geo. 3, c. xxxiv., s. 2, the fee simple of the reclaimed land was vested in the trustees; and that their representatives were not barred by 3 & 4 Wm. 4, c. 27, and

LIMITATIONS, STATUTE OF—*continued.*
were entitled to the reclaimed land at Lady-day, 1867. Drummond *v.* Sant - - - 763
LIMITED DEDICATION—Highway Ex. Ch. 433
See Way, Dedication of.
LIMITS OF PORT - - - - 632
See Port, Limits of.
LIVES, LEASE FOR—Assignment—Covenant for title - - - - - 469
See Covenant for Title.
LLOYD'S REGISTER—Marine insurance—Concealment - - - - 746
See Concealment.
LOCAL BOARD—Apportionment of expenses 451
See Apportionment of Paving Expenses.
—— Negligence of servant - - - 214
See Negligence of Servant. 2.
—— Paving expenses—Owner - - 567
See Owner.
—— Recovery of expenses—Proof of notice 128
See Notice by Local Board.
LOCAL GOVERNMENT ACT, 1858 - - 128
See Notice by Local Board.
—— - - - - - - - 451
See Apportionment of Paving Expenses.
LOCAL GOVERNMENT AMENDMENT ACT, 1861 [451
See Apportionment of Paving Expenses.
LORD CAMPBELL'S ACT—Admiralty Court—Jurisdiction - - - - 729
See Admiralty Court Jurisdiction.
LOSS OF LIFE—Admiralty Court—Jurisdiction [729
See Admiralty Court Jurisdiction.

MANDAMUS—Election commissioners—Certificate to witness - - - - 411
See Certificate of Election Commission.
MARINE INSURANCE—Concealment—Lloyd's register - - - - 746
See Concealment.
—— Effect of slip - - - - 674
See Slip of Policy.
MARRIAGE, BREACH OF PROMISE OF—Letters—Inspection - - 242
See Inspection of Documents.
MASTER AND SERVANT—Negligence - 73
See Negligence of Servant. 1.
—— Negligence—Railway company Ex. Ch. 266
See Negligence of Servant. 2.
—— Negligence—Surveyor of highway - 214
See Negligence of Servant. 2.
—— Tort of servant - - - - 65
See Tortious Act of Servant.
MATERIAL FACT—Concealment—Marine insurance - - - - 746
See Concealment.
MEASURE OF DAMAGES—Trover - 199
See Damages in Trover.
MERCHANT SHIPPING ACT - - 280
See Person in Charge.

MISNOMER—Marine insurance—Slip - 674
See Slip of Policy.
MISREPRESENTATION—Marine insurance—Slip - - - - - 674
See Slip of Policy.
MISREPRESENTATION OF AUTHORITY—*Warranty of Authority by Agent—Action against Directors of Company borrowing Money without Authority.*] The plaintiff lent 70*l.* to a benefit building society, and received a receipt signed by the defendants as two directors of the society, certifying that the plaintiff had deposited 70*l.* with the society for three months certain, to be repaid with interest after fourteen days' notice. The society was formed under 6 & 7 Wm. 4, c. 32, and had no power to borrow money; and the plaintiff, being unable to get her money back from the society, sued the defendants. On the above facts the Court having power to draw inferences:—*Held*, that the defendants were liable to the plaintiff in damages for a breach of warranty of authority, they having, by signing the receipt, in effect represented that they had authority to make a binding contract of loan on behalf of the society, and so induced the plaintiff to part with her money. Richardson *v.* Williamson - 276
MISTAKE—Contract—Sale of goods - 597
See Mistake of Buyer.
MISTAKE OF BUYER—*Vendor and Vendee—Sale of Chattels—Passive Acquiescence of a Seller in the self-deception of the Buyer does not entitle the latter to avoid the Contract.*] The plaintiff offered to sell to the defendant oats, and exhibited a sample; the defendant took the sample, and on the following day wrote to say that he would take the oats at the price of 34*s.* per quarter. The defendant afterwards refused to accept the oats on the ground that they were new, and he thought he was buying old oats; nothing, however, was said at the time the sample was shewn as to their being old; but the price was very high for new oats. The judge left to the jury the question whether the plaintiff had believed the defendant to believe, or to be under the impression, that he was contracting for old oats, and if they were of opinion that the plaintiff had so believed, he directed them to find for the defendant. The jury having found for the defendant:—*Held*, that there must be a new trial:—Per Cockburn, C.J., on the ground that the passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract.—Per Blackburn, J., on the ground that there is no legal obligation in a vendor to inform a purchaser that the latter is under a mistake not induced by the act of the vendor; and that the direction did not bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old. Per Hannen, J., on the ground that the direction did not sufficiently explain to the jury that, in order to relieve the defendant from liability, it was necessary that they should find, not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that the plaintiff believed the defendant to believe that he, the plaintiff, was contracting to sell old oats. Smith *v.* Hughes 597

MISTAKE OF ENGLISH LAW - - 139
See Foreign Judgment. 1.
MISTAKE OF FACT—Payment under - 623
See Payment under Mistake of Fact.
MUNICIPAL CORPORATION—Borough fund 652
See Application of Borough Fund.

MUSIC LICENCE—*House kept for Public Dancing, Music, or other Public Entertainment—Licence for Music only*—25 *Geo.* 2, *c.* 36, *ss.* 2, 3.] Under 25 Geo. 2, c. 36, s. 2, which empowers justices to license a house for public dancing, music, or other public entertainment of the like kind, the justices have a discretion to grant a licence for one of the purposes only, viz., music; and the keeper of a house, with a music licence only, is liable to the penalty for keeping a house without a licence, if he permit public dancing in the house. Brown *v.* Nugent - - - - - 693

NEGLIGENCE—Master and servant - 73
See Negligence of Servant. 1.
—— Highway—Local board of health - 214
See Negligence of Servant. 2.
—— Railway company—Evidence **Ex. Ch.** 377, 481
See Evidence of Negligence. 1, 2.
—— Railway company—Highway - **Ex. Ch.** 759
See Evidence of Negligence. 3.
—— Railway company—Running powers
See Negligence of Servant. 3.
[**Ex. Ch.** 211

NEGLIGENCE OF SERVANT—*Master and Servant—Negligence—Respondeat Superior—Railway Company.*] The stations of the defendants and of two other railway companies at B. adjoin, and are open to one another, and the passengers of each company are in the habit of passing directly from one to the other, the whole area being used as common ground by the passengers of all three companies. While the plaintiff was standing on the defendants' platform, on his way from the terminus of one of the other companies to the booking-office of the other company, waiting for his luggage, a porter of the defendants negligently drove a truck laden with luggage, and a portmanteau fell off and injured the plaintiff:—*Held*, that as the negligence complained of was an act of misfeasance by a servant of the defendants in the course of his employment, the maxim "Respondeat superior" applied; and that under the circumstances the defendants were liable.—*Quære*, whether the defendants would have been liable if any injury to the plaintiff had resulted from the state and condition of the platform upon which the plaintiff had been allowed to enter. Tebbutt *v.* The Bristol and Exeter Railway Co. 73

2. —— *Local Board of Health—Surveyor of Highways—Liability of, for Negligent Misfeasance of Servants employed to repair the Roads—Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *ss.* 37, 117.] A heap of stones was left by the side of a road without light, and the plaintiff on a dark night drove his cart against it, and was upset and injured. The road was in the district of which the defendants were the local board of health, and the heap was left there by the negligence of persons employed by them to repair the roads:—*Held*, that the defendants were liable as the local board, to an action for the negligence of their servants; and were not exempt from liability by reason of

NEGLIGENCE OF SERVANT—*continued.*

s. 117 of 11 & 12 Vict. c. 63, which imposes on them the same duties and liabilities as a surveyor of highways.—*Quære*, whether, if the negligence had been the negligence of the surveyor appointed under s. 37, the local board would have been liable for his negligence, inasmuch as the surveyor cannot be removed by them at pleasure, but only on approval by the General Board of Health. Foreman *v.* The Mayor of Canterbury - 214

3. —— *Railway Company—Negligence—Liability of Company to Passenger for Accident caused by Negligence of Company over whose Line they have running Powers—Contract of Railway Company on giving a Passenger a Ticket.*] The plaintiff took a ticket of the defendants, a railway company, as a passenger from A. to C. At B., between A. and C., the defendants' line joins the line of the T. V. Company, over which the defendants have running powers from B. to C., on payment of certain tolls, the traffic arrangements being left in the control of the T. V. Company, and the station at B. belonging to and being in the exclusive control of the T. V. Company. After leaving B., it being after dark, the train of the defendants in which the plaintiff rode ran into a train of the T. V. Company, and the plaintiff was injured by the collision. The defendants' servants were guilty of no negligence; and the collision was owing to the negligence of the servants of the T. V. Company in sending on their own train without the proper tail light, and allowing the defendants' train to proceed on the same line of rails too soon after the other train without giving any warning to the driver of the defendants' train:—*Held*, that the defendants were liable for the negligence of the T. V. Co.: for that the contract into which a railway company enters with a passenger on giving him a ticket between two places is the same, whether the journey be entirely over their own line or partly over the line of another company, and whether the passage over the other line be under an agreement to share profits, or simply under running powers: viz., that due care shall be used in carrying the passenger from one end of the journey to the other, so far as is within the compass of railway management.—So *held*, by Willes, J., and Bramwell, B., on the authority of *Great Western Ry. Co.* v. *Blake* (7 H. & N. 987; 31 L. J. (Ex.) 346); by the rest of the Court both on principle and authority. Thomas *v.* The Rhymney Railway Company **Ex. Ch.** 266

NOTICE BY LOCAL BOARD—*Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *s.* 69—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *s.* 63—*On information for not paying Apportionment, proof of Preliminary Notice necessary.*] On an information against K. for not paying certain expenses apportioned upon him as owner of premises in a street upon which work had been done by the appellants, under s. 69 of 11 & 12 Vict. c. 63, it was proved that the work had been done, and an apportionment of the expenses made, and notice of it served upon the respondent, who had not given notice within three months that he disputed it, under 21 & 22 Vict. c. 98, s. 63; but no evidence was given of any notice having been served under 11 & 12 Vict, c. 63, s. 69, previous to the appellants' doing the work:—*Held*, that the jus-

NOTICE BY LOCAL BOARD—*continued.*
tices could not make an order unless the preliminary notice were proved to have been given. JARROW LOCAL BOARD OF HEALTH *v.* KENNEDY [128

NOTICE OF ACT OF BANKRUPTCY—*Bankrupt—Execution Creditor*—32 & 33 *Vict. c.* 71, *s.* 95, *subs.* 3.] The notice of an act of bankruptcy, in order to invalidate an execution, under s. 95, subs. 3, of 32 & 33 Vict. c. 71, ought to convey specific information as to the facts constituting the act of bankruptcy, and ought not to leave room for doubt. A notice stating circumstances, which may or may not amount to an act of bankruptcy, is insufficient. H. had obtained judgment against B., a non-trader, and issued a writ of fi. fa. The sheriff seized thereunder certain goods of B. Prior to the seizure, B. had executed a deed of assignment of all his estate and effects to W. for the benefit of B.'s creditors, and thereby committed an act of bankruptcy. On the day after the seizure, the attorneys of B. wrote to the attorney of the execution creditor a letter as follows:—"B. made an assignment of what goods he had, and it was arranged that his daughter should raise the money, but this we find was never finally arrived at." The sheriff sold the goods under the execution; and B. was adjudicated a bankrupt on the next day.—*Held*, that the letter of the attorneys was insufficient as a notice of the act of bankruptcy: and that the execution creditor was entitled to the proceeds of the sale. EVANS *v.* HALLAM. - - - - - 713

NOTICE OF ACTION—*Surveyor of Highways*—5 & 6 *Wm.* 4, *c.* 50, *s.* 109—*Action to recover back Money paid on Illegal Rate.*] The defendants, surveyors of highways, appointed under 5 & 6 Wm. 4, c. 50, received payment from the plaintiff of an assessment upon a highway rate which was neither signed, allowed, nor published according to s. 27 of that Act, but which appeared to have been made under an earlier repealed Act. In making the rate and receiving payment, the defendants intended to act in the performance of the duties of their office. In an action brought to recover back the money paid:—*Held*, that the defendants were entitled to notice of action, pursuant to 5 & 6 Wm. 4, c. 50, s. 109. SELMES *v.* JUDGE. [724

NET—Fixed net - - - 226, 561
See SALMON FISHERY.

"NEW STREET"—*Sewers, Expense of constructing—Metropolitan Local Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 52, 53, 112.] Section 52 of 25 & 26 Vict. c. 102, enacts that where any sewer shall be constructed for the drainage of any new street, the expense shall be defrayed by the owners of the land abutting on such street.—Section 53 enacts that where any sewer shall be constructed in a street in which there has been no sewer, but where sewer rates have been levied previously, the expense shall be defrayed in part only by the owners of the houses situate in and of the land abutting on such street; provided that no street or property in respect of which sewer rates have been levied for five years prior to the 1st of January, 1856, shall be subject to be charged under this section.—Section 112 enacts that the

"NEW STREET"—*continued.*
expression, "new street," shall include, amongst others, all streets the maintenance of the paving and roadway whereof had not previously to the passing of the Act been assumed by the local authorities.—The appellant, about the year 1866, built some houses abutting on the H. Road, and about the same time the vestry of the parish constructed a sewer along the H. Road. Sewer rates had been levied in respect of the land upon which the houses were built for more than five years prior to the 1st of January, 1856. Before 1866 no sewer existed in the H. Road, which was and continued to be a turnpike-road until the 1st of July, 1864, on which day the vestry took charge of it for the first time:—*Held*, that the H. Road was a new street within the meaning of s. 112; that s. 53 did not apply to new streets, as defined by s. 112; and that the appellant was therefore liable to be rated under s. 52.—*Vestry of St. Giles, Camberwell* v. *Weller* (post p. 168, n. (1)), dissented from. SAWYER *v.* THE VESTRY OF PADDINGTON. - - - - - 164

OCCUPATION FOR POOR-RATE—*Poor-rate—Exclusive Occupation of Land—Excavation of Coprolites—Agreement—Construction.*] It was agreed between A. and B. that A. should "forthwith enter upon" B.'s land, and there dig for coprolites in a specified manner, and should effectually fence the excavations and complete them by a given time, and should reinstate the land, and then "yield and deliver up" the land to B. There were no express words giving a right to the exclusive occupation of the land; but the excavations and works contemplated by the agreement required a constant occupation of the land by A. until the coprolites were raised, and the land could not be used for any other purpose from the commencement of the excavations until it had been reinstated, which could not be done for a year or more after the coprolites were raised. B. reserved to himself the right of going upon the land where the excavations were for the purpose of inspecting the works, but he was not required by the agreement to do anything upon the land:—*Held*, upon the construction of the whole agreement, that A. had the right of exclusive occupation of the land, and that he was therefore liable to be rated to the relief of the poor in respect of such occupation. *Reg.* v. *Smith* (3 E. & E. 383; 30 L. J. (M.C.) 74) discussed. ROADS *v.* THE OVERSEERS OF TRUMPINGTON. - - - - - - 56

2. —— *Poor-rate—Beneficial Occupation—Sewers on Embankment, Rateability of.*] The Metropolitan Board of Works constructed sewers on an embankment in the respondents' parish, and erected a pumping-station and other works, forming part of the main-drainage scheme. The board derived no pecuniary advantage from the sewers and other drainage works, and the whole were maintained out of funds raised by a rate made in pursuance of the statutes:—*Held*, that the sewers were not rateable to the poor-rate, on the ground that they were not the subject of a beneficial occupation; but the rest of the property was rateable, at the value for which the same would let to a tenant from year to year, supposing they were not used for the purpose of the main-

OCCUPATION FOR POOR-RATE—*continued.*
drainage scheme, but were entirely disconnected from it, and applied to any other purpose for which they might be available. The Metropolitan Board of Works *v.* The Overseers of West Ham - - - - - 193

ON DEMAND, CHEQUE PAYABLE—Stamp 209
See Stamp.

ORDER OF BOARD OF TRADE—Port - 632
See Port, Limits of.

ORDER OF SECRETARY OF STATE — *Sewage Utilization Acts*, 1865, 1867—*Sanitary Act*, 1866 (29 & 30 *Vict. c.* 90), *ss.* 5, 7, 49—*Orders of Secretary of State—Order to a Sewer Authority limiting a Time to do its Duty—Order appointing a Person to do the Duty of the Sewer Authority.*] A sewer authority having made default in providing the necessary sewers for the district, the secretary of state, under s. 49 of the Sanitary Act, 1866 (29 & 30 Vict. c. 90), made an order, which recited that the sewer authority had "made default in providing a proper system of main drainage," and proceeded, "I do order the said authority to do its duty, and begin to set about the works for the purpose within one month from the date of this order, and proceed therewith until completion." After the month, the sewer authority having done nothing, the secretary of state made a second order appointing J. B. "to perform the said duty of the sewer authority, in respect to sewerage as he shall be directed by me:"—*Held*, that the two orders were justified by the enactments of s. 49. The Queen *v.* Cockerell 252

ORDER OF TREASURY—Port - - 632
See Port, Limits of.

ORDINARY PASSENGER'S LUGGAGE - 612
See Passenger's Luggage.

"OWNER" —*Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *ss.* 2, 69—*Trustee of School not receiving and unable to receive any Rent.*] The appellant was one of three trustees to whom land had been conveyed under 4 & 5 Vict. c. 38, s. 2, for the purposes of the Act, and to permit the premises and all buildings erected thereon to be for ever used as a school for the education of poor children, and for the residence of the master and mistress, and for no other purpose whatsoever. The school, &c., was built and used according to the trust, no rent whatever being received by the trustees.—The local board gave the proper notices, for paving the street along which the school, &c., fronted, to the appellant and the owners of other premises fronting the street, under 11 & 12 Vict. c. 63, s. 69; and they charged the appellant, as "owner" of the school, the proportion according to the frontage of the school:—*Held*, that the appellant was "owner" within s. 2, which enacts, that "owner" "shall mean the person for the time being receiving the rack rent of the lands or premises, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent"; and that the appellant was, therefore, liable to pay the proportion of the expenses. Bowditch *v.* The Wakefield Local Board of Health - 567

PARISH—Township—Separate overseers - 769
See Townships having Separate Overseers.

PARTIES TO ACTION—Adminstrator de bonis non - - - - - 333
See Administrator de bonis non.

—— Executor - - - - 346
See Executor.

PASSENGER—Railway company — Contributory negligence - - Ex. Ch. 377
See Evidence of Negligence. 1.

PASSENGER'S LUGGAGE—*Carriers by Railway* —"*Ordinary Passenger's Luggage.*"] Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, is to be considered as personal luggage.—The plaintiff, a passenger by the defendants' railway from Liverpool to London, took with him in a trunk, as his personal luggage, six pairs of sheets, six pairs of blankets, and six quilts. He had given up his residence in Canada, and these articles were intended for the use of his household when he should have provided himself with a home in London. The trunk having been lost, he sought to recover the value of the articles from the defendants:—*Held*, that the articles, being intended for the use of the plaintiff's household when permanently settled, could not be considered as personal or "ordinary passenger's luggage." Macrow *v.* The Great Western Railway Company - 612

PAVING EXPENSES—Apportionment - 451
See Apportionment of Paving Expenses.

—— Recovery by local board—Proof of notice
See Notice by Local Board. [128

PAYMENT—Fraudulent preference—Surety 790
See Discharge of Surety.

—— Provisional—Banker - - - 623
See Payment under Mistake of Fact.

PAYMENT UNDER MISTAKE OF FACT — *Bankers, Practice of, as to provisional Statement of Accounts—Bill of Exchange.*] The bankers at N. have accounts at the branch bank there of the defendants, the Bank of England; and it is the practice that each banker, having previously ascertained that the bills, cheques, &c., on the other banks will be paid, hands them to the defendants for collection; and they accordingly, at 2 P.M., present the bills, &c., to the drawees, and a cheque is drawn upon the defendants for the aggregate amount, which is then placed to the debit of the drawee's account with the defendants. If the defendants are themselves the holders of a bill, it is presented earlier in the morning to ascertain whether it will be paid, and if so, it is left with the drawee, and a credit-note is given in exchange, and afterwards, upon the presenting of the cheques, &c., this credit-note is taken into the account, and forms part of the sum for which the cheque on the defendants is given. The banks close to the public at 3 P.M., but the bankers' accounts with the defendants' branch are kept open till 4; and between those hours the bankers attend for the purpose of having the day's accounts between them and the defendants investigated, and of rectifying any mistakes and errors of any kind that may have arisen, and of finding and striking the final balance between them; and all mistakes and errors made in

PAYMENT UNDER MISTAKE OF FACT—*cont.*
the course of the day are subject to correction during that investigation.—The plaintiffs had an account with the defendants' branch bank, and the defendants discounted for them a bill, accepted payable at L. & Co. (one of the bankers at N.), of which the plaintiffs were the payees and indorsers. On the morning of the day when the bill became due, the defendants' clerk took the bill to L. & Co., and it was marked by them for payment, and a credit-note was given to the defendants including the amount of the bill. About 2 P.M. the same day, the defendants' clerk took all the cheques drawn on L. & Co. and the credit-note to L. & Co., and they handed to the defendants' clerk a cheque for the aggregate amount. After the closing of L. & Co's bank on the same day, the clerk, who had given the credit-note including the bill, ascertained from the ledger-keeper that the acceptor had not a balance sufficient to meet the bill, and it was also further ascertained that he had stopped payment. Thereupon, at 3.30 P.M., L. & Co.'s outteller requested the defendants to take back the bill. This the defendants did under protest. At this time the defendants had already placed the amount of the bill to the debit of L. & Co. in their account with the defendants. Neither the plaintiffs nor the defendants sustained any damage from the mistake of L. & Co.:—*Held*, that the plaintiffs were entitled to have credit with the defendants for the amount of the bill; as there was nothing in the facts or practice to shew that the payment of the bill by L. & Co. under the circumstances was merely provisional, and subject to revocation provided notice was given before the final closing of the accounts at four o'clock.
POLLARD *v.* THE BANK OF ENGLAND - 623

PENALTY FOR DELAY—Building contract 115
See BUILDING CONTRACT.

PERSON IN CHARGE—*Merchant Shipping Acts*, 1854 *and* 1862 (17 & 18 *Vict. c.* 104, *ss.* 2, 241, 242, 432, 433; 25 & 26 *Vict. c.* 63, *ss.* 23, 33)—*Loss of Life by Collision of two Ships*—"*Ship*" *within Acts*—*Person* "*in charge*"—*Jurisdiction of Justices to suspend Certificate.*] An English steamer ran down a fishing coble off the coast; no injury ensued to the steamer or to any one on board of her, but the coble sank, and three of her crew were drowned. The master of the steamer was below, and the mate was in charge of the deck. The master came up soon after the collision, but neither the mate nor the master took any steps to save the men. An inquest was held on one of the bodies, and the Board of Trade instructed an attorney to attend and report upon it. He reported the result of the inquest, and sent the notes he had taken of the evidence given before the coroner. The Board of Trade directed that an investigation should be instituted, and, on the requisition of the solicitor to the Board, two justices, assisted by two nautical assessors, held an inquiry. Before the inquiry notice was served on the master and mate of the steamer, that in pursuance of the Merchant Shipping Acts, 1854 and 1862, the Board of Trade had directed an official inquiry into the collision (describing it), whereby loss of life ensued, and that the written paper annexed was the statement on which the Board had ordered the inquiry. The

PERSON IN CHARGE—*continued.*
"statement" was a copy of the notes of some of the depositions taken at the inquest. The justices proceeded with the inquiry, after protest by the master and mate, and stated in open court, that the court found that neither the mate, before the master came up, nor the master afterwards, rendered such assistance to the crew of the coble as was practicable without danger to their own ship or crew and ordered their respective certificates to be suspended for three months. On a motion for a certiorari to bring up this order, the above facts were disclosed on affidavits; and it was further shewn that the "coble" was a vessel employed in the herring fishery; it was twenty-four feet long, seven feet beam, ten tons burthen, drawing about eighteen inches; it had about eight feet of deck forward: with a main and mizen mast and a bowsprit to ship and unship, and a jib, mainsail, and mizensail. The masts were easily removeable, and the vessel was fitted with four oars, to be used when occasion required, viz., in harbour or in shoal water, when the rudder, which projected several feet below the keel, had to be removed. Such vessels often went twenty miles out to sea, and were too heavy, when filled with wet nets and fish, to be moved by oars:—*Held*, that the coble was a "ship" within the Merchant Shipping Acts, 1854 and 1862 (17 & 18 Vict. c. 104, and 25 & 26 Vict. c. 63); that the proceedings were valid, and that the justices had power to suspend the certificates under ss. 241, 242, 432, and 433 of the Act of 1854, and ss. 23 and 33 of the Act of 1862; that the copy of the depositions was a sufficient statement or report within par. 6 of s. 23; and that the mate before, and the master after he came on deck, were "in charge" within the meaning of s. 33, which, in case of collision between two ships, makes it the duty of the person in charge of each ship to render such assistance as is practicable, without danger to his own ship and crew, to the crew of the other ship, and makes failure to do so a ground for cancelling or suspending his certificate. *Ex parte* FERGUSON AND HUTCHINSON - - 280

PETROLEUM - - - - 497, 505
See PETROLEUM ACTS.

PETROLEUM ACTS—31 & 32 *Vict. c.* 56—*Sufficiency of Test under ss.* 1, 5, 6, 8, *and Schedule.*] The appellant was convicted by justices under the Petroleum Act, 1868 (31 & 32 Vict. c. 56), s. 4, for keeping and exposing for sale, without a licence, petroleum oil which gave off an inflammable vapour at a temperature of less than 100 degrees of Fahrenheit's thermometer.—At the hearing it appeared that the respondent, the inspector of weights and measures, in making the test as authorized under s. 6, had allowed the thermometer to rest on the bottom of the vessel in which the petroleum was, so that, the vessel being two inches deep, and filled with petroleum, as required by s. 8 and schedule, the thermometer was inserted to the depth of two inches; and it was objected on behalf of the appellant that the test was not legally made as required by the schedule, which says that the thermometer shall be inserted in the oil so that the bulb, which is to be about half an inch in diameter, shall be immersed about one and a half inches beneath the surface.—It was also proved that the respon-

PETROLEUM ACTS—*continued.*
dent had used, to ascertain the flashing point, a spirit lamp with a small wick, having a "very small flame," which is all the schedule requires; but it was shewn, on behalf of the appellant, that waxed twine was the means used by scientific persons for the purpose, which had a still smaller flame.—The justices ruled that there had been sufficient compliance with the schedule on both points, and that the only way the appellant could displace the test was by having a further test made by a "public analyst," as allowed by s. 6. This he declined.—On a case, under 20 & 21 Vict. c. 43, raising the question whether the test was legal on the above two points, and the appellant rightly convicted:—*Held*, that the Court could not say that the test was not legal; and that the conviction must be affirmed. Beck *v.* Stringer - 497

2. —— 25 & 26 *Vict. c.* 66, *s.* 1; 31 & 32 *Vict. c.* 56, *ss.* 3, 4—*All Petroleum within the Acts although not giving off an inflammable Vapour under* 100 *degrees of Fahrenheit.*] By the Petroleum Act, 1862, s. 1, "petroleum," for the purposes of this Act, shall include any product thereof that gives off an inflammable vapour at a temperature of less than 100 degrees Fahrenheit. By the Petroleum Act, 1868, s. 3, for the purposes of the Petroleum Acts, 1862 and 1868, "petroleum" shall include all such rock oil, Rangoon oil, Burmah oil, any product of them, and any oil made from petroleum, coal, schist, shale, peat, or other bituminous substance, as gives off an inflammable vapour at a temperature of less than 100 degrees Fahrenheit:—*Held*, that all petroleum proper, whether giving off an inflammable vapour at under 100 degrees or not, was within the Acts; and that, therefore, the keeping of any petroleum proper, otherwise than for private use, within fifty yards of a dwelling or storehouse, without a licence, was prohibited by s. 4 of the Act of 1868. Jones *v.* Cook 505

PLACE FOR SLAUGHTERING HORSES—*Animals, Prevention of Cruelty to—Keeper of "Place for Slaughtering Houses"*—12 & 13 *Vict. c.* 92, *s.* 9.] Section 9 of 12 & 13 Vict. c. 92,—which imposes a penalty on any person who, having the management of any place for the purpose of slaughtering horses or other cattle, not intended for butcher's meat, shall use or permit to be used any horse or other cattle brought to such place for the purpose of being slaughtered,—applies to private as well as to licensed slaughter-houses.—H. had the management of the kennels of a hunt, where there was a place used solely for the purpose of slaughtering horses sent as food for the hounds. H. received a horse for that purpose and permitted him to be worked:—*Held*, that H. was guilty of an offence under the above section. Colam *v.* Hall - - - - - 206

"PLACE TO WHICH THE PUBLIC HAVE ACCESS" - - - - 130
See Vagrant Acts. 1.

"PLAYING OR BETTING WITH COIN OR INSTRUMENT OF GAMING" 130, 514
See Vagrant Acts.

PLEADING—COMMON LAW—Error—Judgment
See Escape. [Ex. Ch. 47

"PLYING FOR HIRE" - - - - 357
See Hackney Carriage.

POOR—Deficiency in rate—Railway company 698
See Deficiency in Rates.

—— Dissolution of union—Compensation - 785
See Compensation for loss of Office

—— Rating—Beneficial occupation - 193
See Occupation for Poor-rate. 2.

—— Rating—Lands lying near canal - 173
See Lands lying near Canal.

—— Rating—Occupation - - - 56
See Occupation for Poor-rate. 1.

—— Settlements—Townships having separate overseers - - - - 769
See Townships having Separate Overseers.

PORT, LIMITS OF—*Port, within* 54 *Geo.* 3, *c.* 159, *s.* 14—25 & 26 *Vict. c.* 69, *s.* 16—*Board of Trade, Order of, prohibiting the taking of Shingle—Power of Commissioners of Treasury to annul the limits of an old Port and erect a new Port under* 9 & 10 *Vict. c.* 102, *ss.* 14, 15, *and* 16 & 17 *Vict. c.* 107, *s.* 9.] By 54 Geo. 3, c. 159, s. 14, it is enacted that in order to prevent damage being done to the shores of the ports, harbours, and havens in this kingdom, no person shall take any ballast or shingle from the shores or banks of any port, harbour, or haven of the kingdom from which the commissioners for executing the office of Lord High Admiral shall find it necessary for the protection of such port, harbour, or haven, or the works thereof, by order to prohibit the taking. By 25 & 26 Vict. c. 69, s. 16, the powers vested in the Admiralty are transferred to the Board of Trade.—The Board of Trade, on the 1st of August, 1868, made an order for the protection of the harbour of the river Humber, and prohibited the taking of shingle from the shore at Spurn Point from the Low Lighthouse southward to the extreme of the point at low water, and northward two and a half statute miles on both sides of the Spurn Point. A second order was made on the 6th of September, 1869, which, after reciting the first order for the protection of the port of Kingston-upon-Hull, prohibited the taking of shingle from the shores of the said harbour, or from the shores of the port of Kingston-upon-Hull, and the works thereof, between the northernmost boundary of the parish of Hornsea and the limits north of Spurn Point defined by the first order.—The appellant was convicted of taking shingle, not upon any portion of the shores or banks of that which is popularly known or which would be geographically described as the harbour of the Humber, or port of Kingston-upon-Hull, but upon a part of the coast to the north of Spurn Point and lying between Spurn and Hornsea. This was not part of the port of Kingston-upon-Hull or of the harbour of the Humber at the time of the passing of 54 Geo. 3, c. 159, but it was, at the date of the offence, within the limits of the port of Kingston-upon-Hull, as those limits were defined by an order of the Commissioners of the Treasury made in 1848. By that order, made under 9 & 10 Vict. c. 102. the port of Bridlington was annulled, and the coast from Spurn Point to Flamborough Head,

PORT, LIMITS OF—*continued.*
which had formerly been assigned to the port of Bridlington, and which was then within the limits of that port, was transferred to, and directed to form part of, the port of Hull:—*Held*, that the order of the Treasury annulling the port of Bridlington, and assigning the limits of that port to the port of Hull, was not confined to revenue purposes, and that these extended limits formed part of a port within the meaning of 54 Geo. 3, c. 159; that, therefore, the orders of the Board of Trade were valid, and the appellant was rightly convicted. NICHOLSON *v.* WILLIAMS - 632

POST-DATED CHEQUE—Stamp - - 209
See STAMP.

POST-OFFICE—Covenant to use premises as 644
See COVENANT TO USE PREMISES AS POST-OFFICE.

PRACTICE, COMMON LAW — Amendment — Practice - - - - 338
See ADMINISTRATOR DE BONIS NON.

—— Appeal to Quarter Sessions - - 132
See APPEAL TO QUARTER SESSIONS.

—— Arbitration—Submission - - 332
See SUBMISSION TO ARBITRATION.

—— Certiorari—Time to apply - - 652
See APPLICATION OF BOROUGH FUND.

—— Ejectment—Waiver of forfeiture - 245
See WAIVER OF FORFEITURE.

—— Criminal information—Evidence - 352
See LIBEL.

—— Pleading—Judgment - - - 47
See ESCAPE.

—— Partner—Executor - - - 346
See EXECUTOR.

PRELIMINARY EXPENSES—Drainage - 738
See LAND DRAINAGE ACT, 1861.

PRESCRIPTION ACT - - - - 578
See WATERCOURSE.

PROHIBITION—Admiralty Court—Lord Campbell's Act - - - - - 729
See ADMIRALTY COURT JURISDICTION.

PROMISE OF MARRIAGE—Letters—Inspection
See INSPECTION OF DOCUMENTS. [242

PROMISSORY NOTE — Company—Signature by director - - - - 361
See CONTRACT BY AGENT. 1.

PROPERTY OTHER THAN LAND — *Lighting and Watching Rate—Canal—3 & 4 Wm. 4, c. 90, s. 33—Houses and Buildings.*] By s. 33 of 3 & 4 Wm. 4, c. 90, the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any parish, shall be rated at, and pay a rate, in the pound three times greater than that which the owners and occupiers of land shall be rated at and pay for the purposes of this Act. The appellants were possessed of a canal and towing-path, bridges, and a dry dock, lined with masonry, used for repairing the canal boats:—*Held*, that "property" meant things ejusdem generis with houses and buildings, and did not include a canal and towing-path; that the bridges and dry dock were accessories to the canal and must be considered part thereof; and

PROPERTY OTHER THAN LAND—*continued.*
that the whole ought to be rated as land. THE QUEEN *v.* THE OVERSEERS OF NEATH - 707

PROVISIONAL PAYMENT—Banker - 623
See PAYMENT UNDER MISTAKE OF FACT.

PUBLIC HEALTH ACT, 1848 - - 128
See NOTICE BY LOCAL BOARD.

—— - - - - - - - 451
See APPORTIONMENT OF PAVING EXPENSES.

—— - - - - - - - 567
See OWNER.

PUBLICATION—Libel—Evidence - - 352
See LIBEL.

QUALIFICATION—Beerhouse—Licence - 86
See LICENCE TO BEERHOUSE.

QUARTER SESSIONS — Appeal — Beerhouse — Evidence - - - - 89
See LICENCE TO BEERHOUSE. 2.

—— Appeal—Practice - - - 132
See APPEAL TO QUARTER SESSIONS.

—— Appeal—Reference—Costs - - 220
See COSTS ON REFERENCE OF APPEAL.

—— Appeal—Taxation of costs - - 305
See TAXATION OF COSTS.

RAILWAY COMPANY — Deficiency in rates—Liability - - - - 698
See DEFICIENCY IN RATES.

—— Lien for tolls - - 101, Ex. Ch. 776
See LIEN FOR TOLLS.

—— Negligence - 377, 481, Ex. Ch. 759
See EVIDENCE OF NEGLIGENCE.

—— Negligence - - - - 73
See NEGLIGENCE OF SERVANT. 1.

—— Passenger's luggage - - - 612
See PASSENGER'S LUGGAGE.

—— Running powers—Negligence Ex. Ch. 266
See NEGLIGENCE OF SERVANT. 3.

—— Shares—Subscriber - - - 297
See SUBSCRIBER.

—— Tort of servant - - - - 65
See TORTIOUS ACT OF SERVANT.

RAILWAY STATION—Hackney carriage—Plying for hire - - - - 357
See HACKNEY CARRIAGE.

RATE—Canal - - - - - 669
See LAND COVERED WITH WATER.

—— Deficiency—Railway company - 698
See DEFICIENCY IN RATES.

—— Drainage - - - - 738
See LAND DRAINAGE ACT, 1861.

—— Lighting and watching—Rating - 707
See PROPERTY OTHER THAN LAND.

—— Sewers—Exemption - - - 230
See EXEMPTION FROM SEWER RATE.

RATING—Beneficial occupation - - 193
See OCCUPATION FOR POOR-RATE. 2.

—— Poor—Lands lying near canal - 173
See LANDS LYING NEAR CANAL.

REAL PROPERTY — Negligent user — Railway company - - - **Ex. Ch. 759**
See Evidence of Negligence. 3.

RECOVERY OF EXPENSES BY LOCAL BOARD —Apportionment - - - 451
See Apportionment of Paving Expenses.

—— Proof of notice - - - - 128
See Notice by Local Board.

REDUCTION OF DAMAGES—Evidence in—Cross action - - - - 687
See Cross Action.

REMOVAL BY CERTIORARI—Costs - 438
See Costs under County Court Acts.

REMOVAL OF LICENCE—Beerhouse—Evidence
See Licence to Beerhouse. [89

—— Beerhouse—Qualification - - 81
See Licence to Beerhouse.

REPAIR OF ROAD - - - - 181
See Road, liability to Repair.

RESERVATION—Game—Landlord and tenant [366
See Reservation of Game to Landlord.

RESERVATION OF GAME TO LANDLORD — *Game, Reservation of*—1 & 2 *Wm.* 4, *c.* 32, *ss.* 8, 12—*Agreement by Tenant not to kill Game.*] An agreement, under which a tenant held, contained a stipulation that he would not destroy any game, and would endeavour to preserve all game bred and being on the farm. He was convicted under s. 12 of 1 & 2 Wm. 4, c. 32, that he, being the occupier of certain land, the right of killing the game on such land being reserved to his landlord, did unlawfully kill upon such land certain game:—*Held*, by Cockburn, C.J., and Mellor, J. (Lush, J., dissenting), that the stipulation in the agreement could not be construed as a reservation of game to the landlord, and that the conviction ought to be quashed. Coleman *v.* Bathurst - 366

RESERVATION OF GAME TO LORD OF MANOR —*Commons, Inclosure of—Game—Allotment to Commoners reserving the Right to the Game to the Lord—Provisional Order, Sufficiency of—Inclosure Act* (8 & 9 *Vict. c.* 118, *s.* 27; 11 & 12 *Vict. c.* 99, *s.* 1).] The Inclosure Commissioners, under 11 & 12 Vict. c. 99, s. 1, which empowers them to set forth, in their provisional order, any special agreement or matter concerning or affecting the lands to be inclosed, and to make the same a condition of such inclosure, are authorized to make it a condition of the inclosure of a waste that the right of sporting shall be severed from the soil, and the tenement thus created shall remain in the lord, whilst the soil is allotted to others.—The intention to impose such a condition is sufficiently manifested by a clause in the provisional order: —"That one-sixteenth part in value of the lands be allotted to the lords of the manor in lieu of their right and interest in the soil of the lands, exclusively of their right and interest in the game, and in all mines, minerals, stone, and other substrata under the lands." Musgrave *v.* Forster - - - - - - 590

RIGHT OF ACTION—Lex loci—Colony **Ex. Ch. 1**
See Lex loci.

ROAD, LIABILITY TO REPAIR—*Public Health Acts*, 1848 & 1852 (11 & 12 *Vict. c.* 63, *s.* 69; 15 & 16 *Vict. c.* 42, *s.* 13)—"*Highway repairable by the Inhabitants at Large*"—*Effect of Local Statutes.*] By a local Act (8 Geo. 3, c. 44) for paving and lighting the town of H., trustees were appointed with power to cause the streets, &c., to be paved, repaired and lighted, and to levy rates for the purpose on the tenants and occupiers of all houses, &c., within the township; and all persons paying the rates were exempted and discharged from all other charges of paving or lighting the streets.—While this Act was in operation in 1816, a new street was set out on private property connecting two highways; and in 1819 it was passable for carriages, and had been open to and used by the public ever since.—In 1823 this Act was repealed by 4 Geo. 4, c. xc.; and by that Act trustees were appointed, and all persons were exonerated from statute duty for the repairs of the public highways within the town, and from payment of any composition in lieu thereof, and from all liability by law to be called upon for the repairs of such highways; the surveyors under the Act were to have all the rights, duties, and obligations of surveyors of highways, and all indictments and other legal process for non-repair of the roads, &c., were to be brought against the trustees. The trustees were empowered to cause the present and future streets, &c., to be paved, &c.; and when any new streets already laid out, or which should thereafter be laid out, should be sufficiently paved and put in good repair, the trustees had power, on application of the adjoining owners, to declare the same public streets, and they were afterwards to be kept in repair by the trustees; and where any streets, which then were or thereafter should be set out on private property, should have been open to and used by the public for three successive years, the trustees might cause them to be paved, &c., and afterwards such streets were to be deemed to be public streets, and kept in repair by the trustees.—The street had never been paved, nor declared public by the trustees; and up to 1851, though the houses in it had been from time to time rated under the local Acts, the trustees had not repaired it, nor had the expenses of any repairs been paid out of the parochial district or other rates, nor by the inhabitants of the township or district. —In 1851 the Public Health Act, 1848, was applied to the district; and the Local Board of Health proceeded under s. 69 to pave the street, and charged the expense on the adjoining landowners: —*Held*, that the street came within the exception in s. 69 as interpreted by 15 & 16 Vict. c. 42, s. 13, of a "highway repairable by the inhabitants at large": for that there was nothing in the first local Act to prevent a street becoming a highway by dedication and user: that the street had, therefore, become a highway repairable by the inhabitants at large before 1823; and that the second local Act only applied to streets then in progress or afterwards laid out, and had no effect on streets already public.—*Wallington* v. *White* (10 C. B. (N.S.) 128; 30 L. J. (M.C.) 209; 13 C. B (N.S.) 865; 32 L. J. (C.P.) 86) distinguished. Hirst *v.* The Halifax Local Board- - 181

ROGUE AND VAGABOND - - 130, 514
See Vagrant Acts.
RULE OF COURT—Arbitration—Submission 382
See Submission to Arbitration.
RUNNING POWERS—Railway company—Negligence - - - Ex. Ch. 266
See Negligence of Servant. 3.
SALE OF GOODS—Contract—Mistake - 597
See Mistake of Buyer.
—— Statute of Frauds—Signature by agent
See Contract by Agent. 2. [Ex. Ch. 720
SALE OF SHARES—Custom of Stock Exchange [Ex. Ch. 309
See Custom of Stock Exchange.
SALMON FISHERY—*Salmon Fishery Acts*, 1861, & 1865 (24 & 25 *Vict. c.* 109, *s.* 11; 28 & 29 *Vict. c.* 121, *s.* 39)—*Fixed Nets for catching Salmon.*] The mere using of a net, fixed to the soil in tidal waters within the limits of a salmon fishery district, but which net is not peculiarly an instrument for catching salmon, and is not fixed for that purpose, is not an offence under s. 11 of 24 & 25 Vict. c. 109. Watts *v.* Lucas - - 226
2. —— 24 & 25 *Vict. c.* 109, *ss.* 4, 11; 28 & 29 *Vict. c.* 121, *s.* 39 — "*Fixed Engine*"—"*Stop Nets.*"] By s. 11 of 24 & 25 Vict. c. 109, no fixed engine shall be placed or used for catching salmon in any inland or tidal water (except under certain circumstances), and a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed a "fixed engine;" and by s. 39 of 28 & 29 Vict. c. 121, "fixed engine" shall include any net fixed to the soil or made stationary in any other manner.—A "stop net" is used as follows: The fisherman fixes his boat athwart the current of the river by lashing it at each end to a pole driven in the bed of the river. The net, which is thirty feet wide at the mouth, and tapers to a point, is stretched by two poles twenty-two feet long, which are tied together at the upper end, and kept extended (to the width of the net at the mouth) by a pole lashed across at about seven feet from the upper end. The net is lowered overboard until the two poles rest at about eight feet from the upper end on the side of the boat. The net and poles are thus nearly on the balance, and the fisherman presses slightly on the upper end, and so keeps the net steady at about an angle of twelve degrees; he also holds a string attached to the bottom of the net, and when he feels a fish, he presses down the upper end of the poles with both hands, using the edge of the boat as a fulcrum, and so raises the net out of the water, and catches the fish:—*Held*, that the "stop net" was a "fixed engine" within the definitions. Gore *v.* The Special Commissioners for English Fisheries - - - - - 561
SANITARY ACT, 1866 - - - 252
See Order of Secretary of State.
SECRETARY OF STATE—Order of—Jurors 252
See Order of Secretary of State.
SEPARATE CONVICTION—Joint information
See Conviction. [293
SETTLEMENT — Townships having separate overseers - - - - 769
See Townships having separate Overseers.
SEWAGE UTILIZATION ACTS - - 252
See Order of Secretary of State.
—— - - - - - - 669
See Land covered with Water.
SEWER—Order of secretary of state - 252
See Order of Secretary of State.
—— Rating - - - - - - 193
See Occupation for Poor-rate. 2.
SEWER AUTHORITY—Default - - 252
See Order of Secretary of State.
SEWER RATE—Canal - - - 669
See Land covered with Water.
—— Exemption - - - - 230
See Exemption from Sewer Rate.
SEWERS—Expense of constructing—New street
See New Street. [164
"SHAREHOLDER" - - - - 297
See Subscriber.
SHARES, Sale of—Custom of Stock Exchange [Ex. Ch. 309
See Custom of Stock Exchange.
SHERIFF—Escape—Creditors' deed Ex. Ch. 47
See Escape.
"SHIP" - - - - - 280
See Person in Charge.
—— Charterparty—Lien - - Ex. Ch. 522
See Lien for Dead Freight.
—— Insurance—Effect of ship - - 674
See Slip of Policy.
—— Insurance — Concealment — Lloyd's register - - - - 746
See Concealment.
SIGNATURE BY AGENT—Statute of Frauds
See Contract by Agent. [Ex. Ch. 720
SLAUGHTERING HORSES—Cruelty to animals [206
See Place for Slaughtering Horses.
SLIP OF POLICY—*Marine Insurance—Policy to cover Goods upon Ship or Ships to be Declared—Misnomer—Innocent Misrepresentation, Effect of* —30 *Vict. c.* 23, *ss.* 7, 9.] The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description in the policy to which the assured elects to apply the policy; the object of the declaration of the vessel's name is to identify the particular adventure, and the assent of the underwriter is not required to the declaration, for he has no option to reject any vessel which the assured may select.—If a representation be made by the assured to an underwriter, however honestly and innocently, that a ship is new, when in fact she is old, a policy of insurance of goods on board of her made by him will be vitiated, for the age of the vessel must be material in considering the premium.—If the description in a policy of insurance designates the subject with sufficient certainty, or suggests the means of doing it, a mistake as to the name of the ship or as to other particulars, will not annul the contract, and a mistake in the name of the vessel, which does not prejudice the underwriter, does not defeat the policy.—30 Vict. c. 23, s. 7, enacts that no contract or agreement for sea insurance shall be valid

SLIP OF POLICY—*continued.*

unless expressed in a policy, and thereby renders an underwriter's slip incapable of being enforced either at law or in equity; but notwithstanding that statute, a slip may be given in evidence wherever it is, though not valid, material.—The plaintiffs, brokers in London, received from G., at Hamburg, instructions to effect a policy for 121*l.* upon hides on board the *Socrates*, Captain Jean Card. In the Veritas, issued by Lloyd's, was registered the *Socrates*, Captain Albertson, a new Norwegian vessel, and next to it the *Socrate*, Captain Jean Card, an old French vessel. On the 24th of January, 1870, L., a clerk of the plaintiffs, went by their orders to the defendants' office, and asked D., their manager, to grant a policy for 121*l.* on hides on board the *Socrates*. D. looked at the Veritas, and seeing the entry as to the *Socrates*, asked if that was the ship; L. replied that he thought so: the policy for 121*l.* was thereupon granted by the defendants to the plaintiffs for the *Socrates*. The hides were really shipped on board the *Socrate*, and were totally lost.—The plaintiffs, by orders of K., at Hamburg, had opened with the defendants a policy on hides by ship or ships to be declared for 5000*l.*: the slip was signed, but the policy had not been prepared. On the 4th of February, 1870, one of the plaintiffs, at the defendants' office, wrote out a slip for a policy for 2455*l.* on hides per *Socrates*, and another slip for a policy for 2500*l.* on hides by another vessel; he stated to the defendants' clerk that, instead of drawing up an open policy for 5000*l.*, and then declaring on it for 4955*l.*, which would leave so small a balance as 45*l.*, it would be more convenient for all parties to have two ship policies; the clerk assented; and two policies were afterwards executed. The hides insured by the policy for 2455*l.* were shipped on board the *Socrate* and totally lost. The defendants had no reason to believe that the plaintiffs' principals, on the 24th of January and the 4th of February, were the same; and in fact they were not. At the trial the jury found that the parties, in entering into the contracts, both meant to insure the hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the *Socrates*, and that the defendants did not mean only to insure hides on board the *Socrates*:—*Held*, as to the policy for 121*l.* that there was a mistake and a misrepresentation as to the vessel on board of which the hides were shipped, and that the defendants, being under no obligation to subscribe any policy for that 121*l.* were not liable for goods on board the *Socrate*; but, as to the policy for 2455*l.*, that, the defendants being bound on the 4th of February to insure hides on board any ship selected by the plaintiffs, the misnomer was of no consequence, and the defendants were liable. Ionides *v.* The Pacific Fire and Marine Insurance Company - 674

SPECIAL SESSIONS—Beerhouse—Certificate 781
See Licence to Beerhouse. 4.

STAMP—*Banker's Cheque—Cheque payable to order "on demand"—Cheque payable to order and post-dated admissible in Evidence with* 1*d. Stamp*—31 *Geo.* 3, *c.* 25, *s.* 19—55 *Geo.* 3, *c.* 184, *ss.* 8, 11, 12, 13—16 *&* 17 *Vict. c.* 59—17 *&* 18 *Vict. c.* 83.] There is nothing in any of the statutes to invalidate a post-dated cheque on a banker payable *to order* on demand; and in determining what is the requisite stamp to make such an instrument admissible in evidence the instrument alone is to be looked at. Therefore, a post-dated banker's cheque payable to order is available in the hands of a person who took it with knowledge that it was post-dated; and admissible in evidence with only a penny stamp. Bull *v.* O'Sullivan 209

STAMP—*continued.*

STATUTES:

13 & 14 Car. 2, c. 12, s. 21 - - 769
See Townships having Separate Overseers.

29 Car. 2, c. 3, s. 17 - - Ex. Ch. 720
See Contract by Agent. 2.

25 Geo. 2, c. 36, ss. 2, 3 - - - 693
See Music Licence.

31 Geo. 3, c. 25, s. 19 - - - 209
See Stamp.

34 Geo. 3, c. xxiv. s. 19 - - - 173
See Lands lying near Canal.

54 Geo. 3, c. 159, s. 14 - - - 632
See Port, Limits of.

55 Geo. 3, c. 184, ss. 8, 11, 12, 13 - 209
See Stamp.

5 Geo. 4, c. 83 - - - - 130
See Vagrant Acts. 1.

9 Geo. 4, c. 61, ss. 1, 9 - - - 97
See Licence to Beerhouse. 3.

—— —— s. 14 - - - - 781
See Licence to Beerhouse. 4.

—— —— s. 27 - - - - 89
See Licence to Beerhouse. 2.

3 Geo. 4, c. 126, s. 32 - - - 34
See Exemption from Toll.

1 & 2 Wm. 4, c. 32, s. 3 - - - 293
See Conviction.

—— —— ss. 8, 12 - - - 366
See Reservation of Game to Landlord.

2 & 3 Wm. 4, c. 71, s. 2 - - - 578
See Watercourse.

3 & 4 Wm. c. 27 - - - - 763
See Limitations, Statute of.

—— c. 90, s. 33 - - - - 707
See Property other than Land.

5 & 6 Wm. 4, c. 50, s. 109 - - 724
See Notice of Action.

—— c. 76, s. 92 - - - - 652
See Application of Borough Fund.

7 Wm. 4, and 1 Vict. c. 26, s. 3 - - 441
See Devise of Copyholds.

—— —— c. 78, s. 44 - - - 652
See Application of Borough Fund.

3 & 4 Vict. c. 61, s. 1 - - - 86
See Licence to Beerhouse. 1.

8 Vict. c. 16, s. 8 - - - 297
See Subscriber.

—— c. 18, ss. 3, 68 - - - 422
See Compensation under Lands Clauses Act. 1.

—— —— s. 68 - - - - 572
See Compensation under Lands Clauses Act. 2.

STATUTES—*continued.*

—— c. 20, ss. 6, 16 - - - 422
See Compensation under Lands Clauses Act. 1.

—— —— s. 47 - - - Ex. Ch. 481
See Evidence of Negligence. 2.

8 & 9 Vict. c. 101, ss. 2, 3, 75 - -
See Bastardy.

—— c. 118, s. 27 - - - - 590
See Reservation of Game to Lord of Manor.

9 & 10 Vict. c. 93 - - - 729
See Admiralty Court Jurisdiction.

—— c. 95, s. 138 - - - - 82
See High Bailiff of County Court.

—— c. 102, ss. 14, 15 - - - 632
See Port, Limits of.

11 & 12 Vict. c. 63, ss. 2, 69 - - 567
See Owner.

—— —— ss. 37, 117 - - - 214
See Negligence of Servant.

—— —— s. 69 - - - - 128
See Notice by Local Board.

—— —— —— - - - - 181
See Road, Liability to repair.

—— —— ss. 69, 120 - - - 450
See Apportionment of Paving Expenses.

—— c. 99, s. 1 - - - - 590
See Reservation of Game to Lord of Manor.

—— c. 112 - - - - 230
See Exemption from Sewer Rate.

12 & 13 Vict. c. 45, s. 13 - - - 220
See Costs on Reference of Appeal.

—— c. 92, s. 9 - - - - 206
See Place for Slaughtering Horses.

14 & 15 Vict. c. 99, s. 6 - - - 242
See Inspection of Documents.

15 & 16 Vict. c. 42, s. 13 - - - 181
See Road, Liability to repair.

16 & 17 Vict. c. 59 - - - 209
See Stamp.

—— c. 107, s. 9 - - - - 632
See Port, Limits of.

17 & 18 Vict. c. 83 - - - 209
See Stamp.

—— c. 104, ss. 2, 241, 242, 432, 433 - 280
See Person in Charge.

—— c. 125, s. 17 - - - - 332
See Submission to Arbitration.

18 & 19 Vict. c. 120, s. 164 - - 230
See Exemption from Sewer Rate.

19 & 20 Vict. c. 108, s. 21 - - 82
See High Bailiff of County Court.

21 & 22 Vict. c. 98, s. 63 - - - 128
See Notice by Local Board.

—— —— ss. 64, 65 - - - 451
See Apportionment of Paving Expenses.

24 Vict. c. 10, s. 7 - - - 729
See Admiralty Court Jurisdiction.

STATUTES—*continued.*

24 & 25 Vict. c. 61, s. 16 - - - 451
See Apportionment of Paving Expenses.

—— c. 109, ss. 4, 11 - - - 561
See Salmon Fishery. 2.

—— —— s. 11 - - - - 226
See Salmon Fishery. 1.

—— c. 133, ss. 29, 31, 38 - - 738
See Land Drainage Act, 1861.

—— c. 134, ss. 192, 197, 198 - Ex. Ch. 47
See Escape.

—— Vict. c. 134, ss. 192, 198 Ex. Ch. 474
See Estoppel by Judgment.

25 & 26 Vict. c. 63, ss. 23, 33 - - 280
See Person in Charge.

—— c. 66, s. 1 - - - - 505
See Petroleum Acts. 2.

—— c. 69, s. 16 - - - - 632
See Port, Limits of.

—— c. 89, s. 163 - - 101, Ex. Ch. 776
See Lien for Tolls.

—— c. 102, ss. 52, 53, 112 - - 164
See New Street.

—— c. 103, s. 18 - - - - 132
See Appeal to Quarter Sessions.

26 & 27 Vict. c. 29, s. 7 - - - 411
See Certificate of Election Commissioners.

27 & 28 Vict. c. 39, s. 1 - - - 132
See Appeal to Quarter Sessions.

—— c. cccxxii. s. 80 - - - 698
See Deficiency in Rates.

28 & 29 Vict. c. 79 - - - - 769
See Townships having Separate Overseers.

—— c. 121, s. 39 - - - 226, 561
See Salmon Fishery.

29 & 30 Vict. c. 90. ss. 5, 7, 49 - - 252
See Order of Secretary of State.

30 Vict. c. 24, ss. 7, 9 - - - 674
See Slip of Policy.

30 & 31 Vict. c. 106, s. 20 - - - 785
See Compensation for Loss of Office.

—— c. 113, s. 17 - - - - 669
See Land Covered with Water.

—— c. 142. s. 5 - - - - 438
See Costs under County Court Acts.

—— c. 146, ss. 4, 6 - - - 718
See Workshop Regulation Act.

31 & 32 Vict. c. 52, s. 3 - - 130, 514
See Vagrant Acts.

—— c. 56, ss. 1, 5, 6, 8 - - - 497
See Petroleum Acts. 1.

—— —— ss. 3, 4 - - - - 505
See Petroleum Acts. 2.

32 & 33 Vict. c. 27 - - - - 781
See Licence to Beerhouse. 4.

—— —— s. 8 - - .. 97
See Licence to Beerhouse. 3.

—— —— ss. 8, 9 - - - - 86
See Licence to Beerhouse. 1.

—— c. 71, s. 95 - - - - 713
See Notice of Act of Bankruptcy.

STATUTES—*continued*
—— c. 99, s. 10 - - - - 370
See Knowingly Suffering Thieves to Assemble.
—— c. 115, s. 4 - - - - 357
See Hackney Carriage.
STATUTE OF FRAUDS—Signature of agent
See Contract by Agent. 2. [Ex. Ch. 720
STATUTE OF LIMITATIONS—Realty - 763
See Limitations, Statute of.
STOCK EXCHANGE—Custom of - Ex. Ch. 309
See Custom of Stock Exchange.
STOP NET—Salmon fishery - - - 561
See Salmon Fishery.
"SUBMISSION TO ARBITRATION"—*Submission to Arbitration—Clause in Building Contract as to Certificate of Architects—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 17—*Words purporting that the Submission shall not be made a Rule of Court.*] By a written agreement plaintiff agreed to build four houses on land of defendant, defendant to grant plaintiff a lease when the houses were completed: the architects for the time being of defendant were to certify as to the progress of the work, and if there should be any unnecessary delay or unsatisfactory conduct on the part of plaintiff with regard to the erection of the buildings, or any matter or thing connected therewith ("the fact of such delay or unsatisfactory conduct to be ascertained and decided in writing by the architects, against whose decision there shall be no appeal"), then it should be lawful for defendant to employ other persons to execute the works, and to sell the buildings and lease the land to other persons. On an application to make the agreement a rule of court under s. 17 of the Common Law Procedure Act, 1854:—*Held* (by Cockburn, C.J., Blackburn and Mellor, JJ.), that, assuming the agreement to be "an agreement or submission to arbitration" within the section, the clause that there was to be no appeal against the decision of the architects amounted to "words purporting that the parties intended that it should not be made a rule of court."—*Semble*, by the same judges, that the agreement was not a submission to arbitration.—*Held*, by Hannen, J., that it was not. Wadsworth *v.* Smith - 332
SUBSCRIBER—*Railway Company*—"*Subscriber*"—*Agreement to subscribe*—"*Shareholder*"—*Companies Clauses Consolidation Act*, 1845 (8 *Vict. c.* 16) *s.* 8.] A Railway Act, after naming certain persons, enacts that they and "all other persons who have already subscribed or shall hereafter subscribe to the undertaking, are by this Act united into a company for the purpose of making and maintaining a railway." The Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16), s. 8, enacts that every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders, shall be deemed a shareholder of the company.—Prior to the passing of the Railway Act, defendants and others signed a document, whereby they agreed on the passing of the Act for the construction of the railway to subscribe for the number of shares of 10*l.* each placed opposite their respective names, defendants' number being fifty. The Act passed in 1865; in 1866 an allotment of shares was made to defendants, but no notice was given to them; and soon afterwards the proceedings of the company were suspended. Defendants' names were placed on the register of shareholders, and in April, 1868, the register was resealed, defendants' names being then on it for fifty specific shares; but no notice of this registration was given to defendants. Calls having been soon after made, defendants repudiated all liability as shareholders:—*Held*, that under the agreement defendants were "subscribers" to the undertaking within the meaning of the Railway Act, and therefore had been rightly put on the register, and were "shareholders" within s. 8 of the Companies Clauses Consolidation Act, and liable to pay the calls. Burke *v.* Lechmere - - - - - - 297
SURETY—Liability—Creditors' deed Ex. Ch. 474
See Estoppel by Judgment.
—— Void payment by principal - - 790
See Discharge of Surety.
SURVEYOR OF HIGHWAYS—Neligence - 214
See Negligence of Servant. 2.
—— Notice of action - - - 724
See Notice of Action.

TAXATION OF COSTS—*Appeal—Costs—Taxation of Costs at adjourned Sessions.*] The appellant appealed to the quarter sessions held in October against the refusal of a beerhouse certificate. The appeal was dismissed with costs. The sessions were afterwards adjourned to November, and the costs of the appeal were taxed at the adjourned sessions:—*Held*, that the costs were rightly taxed at the adjourned sessions. Rawnsley *v.* Hutchinson. - - - - - - - 305
TEST—Sufficiency of—Petroleum - - 497
See Petroleum Acts. 1.
TITLE—Covenant for—Assignment of lease for lives - - - - - 469
See Covenant for Title.
TOLL—Exemption - - - - 34
See Exemption from Toll.
TOLLS—Lien - - - 101 Ex. Ch. 767
See Lien for Tolls.
TORTIOUS ACT OF SERVANT—*Master and Servant—Railway Company, Responsibility of, for Acts of Servants—Arrest of Person supposed to have attempted a Felony.*] A clerk in the service of a railway company, whose duty it is to issue tickets to passengers, and receive the money, and keep it in a till under his charge, has no implied authority from the company to give into custody a person whom he suspects has attempted to rob the till, after the attempt has ceased; as such arrest could not be necessary for the protection of the company's property. And the company is therefore not liable for the act of the clerk. Allen *v.* The London and South Western Railway Company. - - - - - - 65
TOWNSHIPS HAVING SEPARATE OVERSEERS—*Poor—Order of Removal—Settlement—Parish—Subdivision into Townships*—13 & 14 *Car.* 2, *c.* 12, *s.* 21—*The Union Chargeability Act*, 1865, 28 & 29 *Vict. c.* 79.] Where a parish consisting of several

TOWNSHIPS HAVING SEPARATE OVERSEERS —*continued.*

townships has maintained its own poor, and afterwards separate overseers are appointed for each township under 13 & 14 Car. 2, c. 12, s. 21, the parish is, for the purposes of settlement, destroyed, and a settlement gained in it by birth in one of the townships, before the appointment is wholly lost, and the pauper does not acquire a fresh settlement in the particular township.—So held on the authority of decided cases.—This has not been altered by 28 & 29 Vict. c. 79, as that Act, in referring to an order of removal of a pauper settled in any parish, applies only to a parish actually existing for the purposes of settlement at the time when the order of removal is made. Stourbridge Union *v.* Droitwich Union. - 769

TRADER, ASSIGNMENT BY—Bankruptcy 77
See Fraudulent Preference.

TREASURY, ORDER—Port - - - 632
See Port, Limits of.

TROVER—Measure of damages - - 199
See Damages in Trover.

TRUSTEE—Cestui que trusts—Statute of Limitations - - - -
See Limitations, Statute of.

TRUSTEE OF SCHOOL - - - 567
See Owner.

TURNPIKE—Toll—Exemption - - - 34
See Exemption from Toll.

UNION—Dissolution—Compensation - 785
See Compensation for Loss of Office.

UNION CHARGEABILITY ACT - - 769
See Townships having separate Overseers.

USAGE OF STOCK EXCHANGE— - Ex. Ch. 309
See Custom of Stock Exchange.

"USUAL PLACE OF RELIGIOUS WORSHIP" 34
See Exemption from Toll.

VACCINATION—*Vaccination Act*, 1867 (30 & 31 *Vict. c.* 84), *s.* 31—*Power of Justice to order Vaccination of Child, in the Absence of the Child.*] By 30 & 31 Vict. c. 84, s. 31, if the registrar or other officer has reason to believe a child under the age of fourteen within his district has not been vaccinated, nor had the smallpox, information may be laid before a justice, and he may summon the parent to appear before him with the child, at a certain time and place; and upon the appearance, if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated nor had the small-pox, he may, if he see fit, order the child to be vaccinated within a given time.—A parent having been summoned appeared before the justice, but refused to produce his child; the justice was satisfied upon the evidence given that the child was under two years old, and had not been vaccinated;—*Held*, that the production of the child was not a condition precedent to the justice's power to make an order for it to be vaccinated. Dutton *v.* Atkins. - 373

VAGRANT ACTS—(5 *Geo.* 4, *c.* 83)—*Vagrant Act Amendment Act*, 1868 (31 & 32 *Vict. c.* 52), *s.* 3—"*Playing, or Betting, with a Coin, or other Instrument of Gaming*"—"*Game of Chance*"—"*Place*

VAGRANT ACT—*continued.*

to which the Public are permitted to have Access."] Depositing a half-sovereign as a bet on a dog-race, is not "betting with a coin as an instrument of gaming at a game of chance," within the Vagrant Act Amendment Act (31 & 32 Vict. c. 52), s. 3.—*Quære*, whether enclosed grounds, to which persons are admitted on payment of a price for admission, is "a place to which the public have or are permitted to have access" within the above section. Hirst *v.* Molesbury. - - - - 130

2. —— (31 & 32 *Vict. c.* 52), *s.* 3—*Gaming—Instrument of Gaming—Game of Chance—Betting on Horse-race.*] By 31 & 32 Vict. c. 52, s. 3, any person, playing or betting in a public place with any table or instrument of gaming at any game of chance, is liable to be convicted as a rogue and vagabond.—The appellants were convicted under the above section, on evidence from which it appeared that they were the proprietors of a machine called a "pari mutuel." The machine had on it numbers, beside each of which were three holes, and behind these holes were figures, which, by a mechanical contrivance, were made to shift on the turning of a key, so that any number from 0 to 999 would be exhibited behind these holes. On the top of the machine was the word "total:" and beside it were holes in which could be exhibited in a similar manner figures shifting on the turn of the key. The appellants took this machine to a racecourse, and appropriated each of the numbers to designate a particular horse about to run a race. Any person who wished to bet on a particular horse deposited with the appellants half-a-crown, and received a ticket with the number appropriated to the horse; and the appellants, by a turn of the key, altered the figures, increasing the sum indicated alongside of that number by one; and the same turn of the key increased the figures beside "total" by one. When the race had been run the holders of tickets with the number of the winning horse had divided among them the amount of all the half-crowns deposited, less 10 per cent., which the appellants retained as proprietors of the machine:—*Held*, that the machine was an instrument of gaming within the statute; and that the appellants had been rightly convicted.] Tollett *v.* Thomas - - 514

VALUE—Conversion—Measure of damages 199
See Damages in Trover.

—— Poor-rate - - - - 173
See Lands lying near Canal.

VENDOR AND PURCHASER — Assignment of lease for lives - - - 469
See Covenant for Title.

WAIVER OF FORFEITURE — *Ejectment — Forfeiture for Breach of Covenant—Waiver of Forfeiture by bringing Ejectment for Non-payment of subsequent Rent.*] In ejectment by landlord under a proviso for re-entry on breach of covenant, the plaintiff, under an order for particulars, gave as breaches the permitting a sale by auction on the premises without the plaintiff's consent, and also the non-payment of several quarters rent which accrued after the date of the sale. The defendant then obtained a judge's order, under the Common Law Procedure Act, 1852, s. 212, staying the action as to the breach for non-payment of rent, on pay-

WAIVER OF FORFEITURE—*continued.*
ment of the rent to the plaintiff, or into court if he refused it. The plaintiff refused the rent, and the money was paid into court. At the trial the forfeiture by the sale by auction was proved:—*Held*, that there had been no waiver of the forfeiture. Toleman *v.* Portbury - - 245

WARRANTY—Agent—Authority - - 276
See Misrepresentation of Authority.

—— Sale of goods—Mistake - - 597
See Mistake of Buyer.

WATERCOURSE—*Easement—Rights of servient Owner as against dominant Owner—Prescription Act* (2 & 3 *Wm.* 4, *c.* 71), *s.* 2—*Enjoyment, "as of right."*] Before 1800, a canal company, under powers of an Act of Parliament, diverted for the purposes of the canal a considerable part of the water from a brook, which flowed through the plaintiff's land, at a point above the plaintiff's land, the rest of the water continuing to flow in its natural channel. In 1847 an Act was passed authorizing the defendants, a railway company, to purchase the canal, to discontinue the use of it, and to fill it up, and sell such parts as were not used for the railway. Under these powers the use of the canal was discontinued in 1853; and in 1864 the defendants made a cut by which they restored to the brook at a point above the plaintiff's land the water which had been diverted from it. In 1865 the defendants conveyed the part of the canal on which they had made the cut to a purchaser in fee. The bed of the stream, owing to the diminished scour of the water from 1800 to 1853, had been silted up, so as to be insufficient to carry off the water coming down in extraordinary floods. In 1866 such a flood occurred; the water overflowed the plaintiff's land and damaged his crops; upon which he brought an action against the defendants:—*Held*, that there being no obligation imposed upon the canal company to continue the diversion, the plaintiff had no right of action:—By Blackburn and Hannen, JJ.: On the ground that, though the claim to have the water, which would otherwise have come down to the plaintiff's land, diverted over other land was a claim to a watercourse within the Prescription Act (2 & 3 Wm. 4, c. 71), s. 2, yet the enjoyment was not as of right, and therefore, though for more than forty years, conferred no right on the plaintiff.—By Cockburn, C.J.: on the ground that the plaintiff, the owner of the servient tenement, could acquire, by the mere existence of the easement, no right as against the owner of the dominant tenement to the continuance of the diversion.—*Quære*, by Blackburn and Hannen, JJ., whether such a right could be acquired under the Prescription Act against a canal company.—*Semble*, by the same judges, on the authority of *Roswell* v. *Prior* (12 Mod. 635), that the fact of the defendants having parted with the property would not have affected their liability. Mason *v.* The Shrewsbury and Hereford Railway Company - 578

WAY, DEDICATION OF—*Highway—Limited Dedication—Right of Owner of Soil to Plough up Footpaths.*] The plaintiff was the occupier of an arable field, across which a footway from time immemorial had been used by every person at his pleasure; but the plaintiff and his predecessors had also from time immemorial ploughed up the

WAY, DEDICATION OF—*continued.*
footway when and in such parts as they thought fit, and in other parts lifted the plough across it. The defendants were surveyors of highways, and in order to repair the footway placed materials on it, making it a hard causeway, so as to prevent the plaintiff from ploughing it up:—*Held*, that the footway was a highway, which it must be assumed had been dedicated to the public subject to the condition that the owner of the soil might plough it up, and that there could at law be such a limited dedication; and that the defendants were therefore liable for the trespass. *Mercer* v. *Woodgate* (Law Rep. 5 Q. B. 26) affirmed. Arnold *v.* Blaker - - - - Ex. Ch. 433

—— Dedication of - - - - 181
See Road, Liability to Repair.

WILL—Devise of copyholds - - 441
See Devise of Copyholds.

WILLS ACT - - - - - 441
See Devise of Copyholds.

WINDING-UP—Company—Contract - 101, [Ex. Ch. 776
See Lien for Tolls.

WINE AND BEERHOUSE ACT, 1869.
See Statute 32 & 33 Vict. c. 27.

WITNESS—Certificate of election commission 411
See Certificate of Election Commissioners.

WORDS—"Agreement or submission to arbitration" - - - - 332
See Submission to Arbitration.

—— "As of right" - - - - 578
See Watercourse.

—— "Damage" - - - - 729
See Admiralty Court Jurisdiction.

—— "Fixed engine" - - - 561
See Salmon Fishery. 2.

—— "Handicraft" - - - - 718
See Workshop Regulation Act.

—— "Highway repairable by the inhabitants at large" - - - - 181
See Road, Liability to repair.

—— "Instrument of gaming" - - 514
See Vagrant Acts. 2.

—— "Knowingly suffering thieves to assemble" [378
See Knowingly suffering Thieves to Assemble.

—— "Land covered with water" - - 669
See Land covered with Water.

—— "Lands" - - - - 422
See Compensation under Lands Clauses Act. 1.

—— "Lands lying near canal" - - 173
See Lands lying near Canal.

—— "New street" - - - - 164
See New Street.

—— "Owner" - - - - 567
See Owner.

—— "Person in charge" - - - 280
See Person in Charge.

—— "Petroleum" - - - - 505
See Petroleum Acts. 2.

—— "Place for slaughtering horses" - 206
See Place for slaughtering Horses.

WORDS—*continued.*
—— "Place to which the public have access" 130
See Vagrant Acts. 1.
—— "Playing or betting with any instrument of gaming" - - - - 514
See Vagrant Acts. 2.
—— "Playing or betting with coin or instrument of gaming" - - - 130
See Vagrant Acts.
—— "Plying for hire" - - - - 357
See Hackney Carriage.
—— "Property other than land" - - 707
See Property other than Land.
—— "Shareholder" - - - - - 297
See Subscriber.
—— "Ship" - - - - - - 280
See Person in Charge.
—— "Submission to arbitration" - - 332
See Submission to Arbitration.
—— "Subscriber" - - - - - 297
See Subscriber.

WORDS—*continued.*
—— "Usual place of religious worship" - 34
See Exemption from Toll.
—— "Worship" - - - - - 718
See Workshop Regulation Act.

WORKSHOP REGULATION ACT—30 & 31 *Vict.* c. 146, *ss.* 4, 6—"*Handicraft*," "*Workshop*"—*Employment of Child under Eight Years.*] A child under eight years of age was sent to the respondent to be taught to make straw plait and to read: the child was kept in a room making straw plait under the respondent's superintendence. The straw was provided by the child's mother, and the plait was taken home to her, and she sold it. She paid the respondent 3*d.* a week, but he had no interest in the proceeds of the sale of the work:—*Held*, that the respondent had committed the offence of employing a child under eight years of age, within the meaning of ss. 6 and 7 of 30 & 31 Vict. c. 146, as read by the aid of the interpretation clause, s. 4. Beadon *v.* Parrott - 718

END OF VOL. VI.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

BIBL. LONDIN UNIV.

UCSF